NO. 88-1102

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

WESTMINSTER MANAGEMENT CORPORATION, ET ALS,
Petitioners,

v.

PAUL C. MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS, AND ATTORNEY GENERAL WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED

Petitioners instituted this suit alleging that their *ad valorem* real estate taxes were assessed on a proper basis, but that the remainder of the taxes throughout the Parish of Orleans, State of Louisiana, are not assessed at their fair market value, and accordingly, the tax imposed on their fair market value, and accordingly, the tax imposed on their property was null and void. The suit was dismissed on procedural grounds, raising two constitutional questions:

1. Does the State of Louisiana provide its ad valorem taxpayers with a "plain, adequate and complete remedy" to determine the validity of *ad valorem* taxes as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Does the dismissal of this suit which raises constitutional questions, based on retroactive reliance on an appellate decision violate Petitioner's 'due process' rights?

LIST OF INTERESTED PARTIES

Westminster Management Corporation
LePavillon Hotel
Jerry Bilbe
Sheila B. Bellarie
Kathleen M. Bilbe
Mary D. Bilbe
Regent York Incorporated
New Orleans Diamond and Jewelry Wholesalers, Inc.
Turngemeinde Partnership in Commendam
Hartwig Moss Insurance Agency, Ltd
W. R. Zanes & Co. of La., Inc.
Bernos Investment Corporation
Six-O-One Julia Corporation
Aitkens Realty Co., Inc.
Commodore Thomas J. Lupo Enterprises
New Orleans Rivercenter
International Rivercenter
Garon and Brener
John C. Lovell, Jr.
J. A. Hoerner Co., Inc.
James M. Ber
Delta Theatres, Incorporated
Thomas D. Church
National Meat and Provision Co.
210 Baronne Street Limited Partnership
Canarles Realty Corp.
Killian L. Huger, Jr., et al
Dixie Art Supplies, Inc.
Place St. Charles, a Louisiana partnership
Joseph C. Canizaro Interests
Cliff Probst, Inc.
First National Bank of Commerce, Trustee (The Alon Trust)
MFG, Ltd. d/b/a Leo Fellman & Co., Realtors

LIST OF INTERESTED PARTIES (continued)

To the best of our knowledge and belief, there are no affiliations except the following:

International Rivercenter, a partnership *in commendam* -Santa Fe Pacific Realty Corporation, L. & N Investment Corporation, Hilton Hotels Corporation, and local individuals.

Place St. Charles, a partnership *in commendam* - local law firms and individuals, Fidinam (USA), Inc. and **DG Immobilien-Anlagegesellschaft Heinz Liebherr Verwaltungsgesellschaft mbH & Co. KG Objekt New Orleans,** a West German Limited Partnership.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WESTMINSTER MANAGEMENT CORPORATION, ET ALS,

Petitioners,

V.

PAUL C. MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS, AND ATTORNEY GENERAL WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

OPINIONS BELOW

The opinions below consist of an unreported decision of the Louisiana 4th Circuit Court of Appeal dated November 2, 1987, Docket C-8656 (Appendix C), and the decision of the same court in the matter entitled *Westminster Management Corp., et al v. Mitchell, et al*, 525 So.2d 1171 (La. App. 4th Cir. 1988), (Appendix D), writs denied by the Louisiana Supreme Court, October 14, 1988 (Appendix E).

JURISDICTION

The jurisdiction of this court to review the judgment below rests on 28 U.S.C. § 1257(3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following are the relevant portions of pertinent constitutional and statutory provisions.

FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION

> No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Louisiana Constitution of 1974, Article VII, § 18 provides:

§ 18. Ad Valorem Taxes

> Section 18. (A) Assessments. Property subject to ad valorem taxation shall be listed on the assessment rolls at its assessed valuation, which, except as provided in Paragraph (C), shall be a percentage of its fair market value. The percentage of fair market value shall be uniform throughout the state upon the same class of property.

(B) Classification. The classifications of property subject to ad valorem taxation and the percentage of fair market value applicable to each classification for the purpose of determining assessed valuation are as follows:

Classifications		Percentages
1.	Land	10%
2.	Improvements for residential purposes	10%
3.	Other property	15%

* * *

(D) Valuation. Each assessor shall determine the fair market value of all property subject to taxation within his respective parish or district except public service properties, which shall be valued at fair market value by the Louisiana Tax Commission or its successor. Each assessor shall determine the use value of property which is to be so assessed under the provisions of Paragraph (C). Fair market value and use value of property shall be determined in accordance with criteria which shall be established by law and which shall apply uniformly throughout the state.

(E) Review. The *correctness* of assessments by the assessor shall be subject to review first by the parish governing authority, then by the Louisiana Tax Commission or its successor, and finally by the courts, all *in accordance with procedures established by law.*

La. R.S. 47:1998 provides (as edited by petitioners) as follows:

§ 1998. Judicial review; generally

A. Any taxpayer in the state dissatisfied with the action of the tax commission under the provisions of R.S. 47:1989, *shall have the right* to institute suit within thirty days of the decision of the tax commission in either the district court for the parish where the tax commission is domiciled or the district court of the parish where the property is located contesting the correctness of assessment. Any taxpayer who owns property assessed in more than one parish may institute this suit in either the district court for the parish where the tax commission is domiciled or the district court of any one of the parishes in which the property is located and assessed. Any taxpayer who has filed suit under this provision and whose taxes have become due shall pay said taxes under protest and shall cause to issue notice to the officer designated by law for the collection of such tax under the provisions of R.S. 47:2110(E). However, the portion of taxes that is not in dispute shall be paid without being made subject to the protest.

B. Any taxpayer in the state shall have the right to institute suit in either the district court for the parish where the tax commission is domiciled or the district court of the parish where the property is located, for the purpose of contesting the correctness or legality of any change in assessment made against the property under written instructions of the tax commission, pursuant to R.S. 47:1990, which suits must be instituted within thirty days after the date of the written instructions of the tax commission ordering the change. Any taxpayer in the state who has filed suit under these provisions and whose taxes have become due shall pay said taxes under protest and shall cause to issue a notice to the officer designated by law for the collection of such

tax under the provisions of R.S. 47:2110(E). However, the portion of taxes that is not in dispute shall be paid without being made subjected to the protest.

(Underscording ours.)

* * *

La. R.S. 47:2110 (emphasis added) provides as follows:

§ 2110. Suits to recover taxes paid under protest

A. No court of this state shall issue any process whatsoever to restrain the collection of an ad valorem tax imposed by the state, or by any political subdivision thereof, under authority granted to it by the legislature or by the constitution. Any person resisting the payment of any amount of tax found due, or the enforcement of any provision of the tax laws in relation thereto, shall pay the amount found due to the officer designated by law for the collection of such tax and shall give the officer notice at the time of payment of his intention to file suit for the recovery of such tax. Upon receipt of such notice, the amount so paid shall be segregated and held by the officer for a period of thirty days. If suit is filed within such time for the recovery of the tax, then that portion of the taxes paid that are in dispute shall be deemed as paid under protest and such amount shall be segregated and shall be further held pending the outcome of the suit. That portion of the taxes paid by the taxpayer to the officer which is not in dispute shall not be made subject to the protest. If the taxpayer prevails, the officer shall refund the amount to the tax-

Louisiana Revised Statutes will be cited thus, La. R.S. 47:1998.

payer with interest at the rate of two percent per annum for the period from the date such funds were received by the officer to the date of such refund. If the taxpayer does not prevail, the taxpayer shall be liable for the additional taxes together with interest at the rate of two percent per annum from the date the notice of intention to file suit for recovery of taxes was given to the officer until the date such taxes are paid.

B. The right to sue for recovery of a tax paid under protest as provided herein shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter for a full and complete adjudication of any and all questions arising in the enforcement of such right respecting the legality of any tax accrued or accruing or the method of enforcement thereof. In any such suit, service of process upon the officer designated by law for the collection of the tax shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

* * *

D. *The right of action provided in this section shall be in addition to any rights elsewhere provided in this Sub-title, including R.S. 47:1998, affording taxpayers an opportunity to test the legality or correctness of their assessments or ad valorem taxes paid under protest before the courts of state.*

* * *

STATEMENT OF THE CASE

A. The System

At the time this action was instituted on February 26, 1987, the ad valorem tax system in New Orleans, Louisiana was substantially as follows:

The City of New Orleans, which comprises all of Orleans Parish, was and remains divided into seven assessment districts with an assessor for each district. This is unique in Louisiana, for each other parish has a single assessor. It is the obligation of the assessor to appraise the real estate in his geographical area at its fair market value; then a percentage is applied to this appraisal and the assessment is thus determined. The tax is calculated by multiplying the assessment by a millage which is set by the various tax recipient bodies.[1] This millage is uniform throughout the City.

The assessors are required to open their assessment rolls for examination by taxpayers on August 1 of each year.[2] A taxpayer who disputes the correctness of his assessor's assessment of his property may appeal to the Board of Review.[3] If the taxpayer is not granted relief by the Board of Review, the taxpayer may appeal to the Louisiana Tax Commission.[4]

Article VII, Section 18(E) of the Louisiana Constitution provides that if a taxpayer seeks to obtain a *correction* of his assessment, he must first appeal to the Board

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[1] See *Louisiana Constitution*, Article VII, § 18, *supra*.

[2] La. R.S. 47:1992.

[3] *Id.* In the City of New Orleans, it is the City Council which sits as a Board of Review.

[4] 4. La. R.S. 47:1989.

of Review, then to the Louisiana Tax Commission. Having exhausted those administrative remedies to obtain judicial review, the taxpayer may appeal to ". . .the courts, all in accordance with procedures established by law."[5]

Two procedures have been established by the State Legislature:

1. Under La. R.S. 47:1998, a taxpayer may appeal to the courts ". . .within thirty days of the decision of the tax commission. . ."

2. La. R.S. 47:2110 provides a right to sue for recovery of a tax paid under protest, which "right of action provided in this section shall be in addition to any rights elsewhere provided in this Sub-title, ... to test *the legality or correctness* of their assessments or *ad valorem* taxes paid under protest before the courts of state."

In *Churchill Farms, Inc. v. Louisiana Tax Commission*, 338 So.2d 963 (La. App. 4th Cir. 1976), the Court held that La. R.S. 47:2110 provided the "plain, adequate and complete" remedy for a taxpayer to contest taxes levied against its property.

B. Petitioner's Action

Petitioners paid their taxes under protest, and pursuant to La. R.S. 47:2110, timely filed these proceedings, contending that although the assessments on their properties substantally met the standard of fair market value as required by the Louisiana tax system, i.e., their *assessor's* assessments were correct, their real estate taxes were nevertheless null and void and invalid for the reason that

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[5] *Louisiana Constitution*, Article VII, *supra*, Section 18(E), last phrase.

the remainder of the assessors throughout the City failed to meet the statutory requirements of assessing property according to the prescribed standards. Therefore, the petitioners were not afforded "equal protection of the law" and were entitled to have their taxes declared invalid, and to recover whatever relief was afforded them, predicating this action on *Siou City Bridge Co. v. Dakota County,* 260 U.S. 441 (1923) and its progeny.[6]

The petitioners at no time alleged that their assessments were "incorrect". To the contrary, certain of petitioners appealed to the Board of Review, alleging that the manner in which the tax statutes were applied deprived of "equal protection of the law." Petitioners attempted to prevail upon the Board of Review to apply a reduction of their assessments consistent with *Sioux City,* under which they were entitled to equal protection of the law. Certain of petitioners appealed to the Louisiana Tax Commission on the same bases, that is, confirming the correctness of their assessor's assessments, but seeking *Sioux City* relief because of inconsistent assessment practices elsewhere in the City.

C. The LOWREY CASE

On June 26, 1987, which was months after petitioners filed this suit, the Louisiana Third Circuit Court of Appeal decided *Lowrey Chevrolet, Inc. v. Brumley,* 510 So.2d 1294 (La. App. 3rd Cir. 1987),[7] holding Lowrey's action alleging that its taxes were improperly assessed was for the "correctness" of the assessment and must be brought under La. R.S. 47:1998.

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[6] Petition and Amended Petition, Appendix A and B.

[7] This decision is dully set out in Appendix F.

Based upon this decision rendered *after* this suit was filed, respondents successfully moved for the dismissal of this action, the court below holding that petitioners' action was to determine the "correctness", not the "legality" of assessments, and should have been instituted within thirty days of the decision of the Louisiana Tax Commission, pursuant to La. R.S. 47:1998, and that there was no action available to petitioners under La. R.S. 47:2110.

From the outset of these proceedings, petitioners have contended that this action does not attack the constitutionality *of the statute* itself, *but its application*, and therefore, attacks the "legality" of the assessment system, and not the correctness of thier assessor's actions, and accordingly, proceeding under La. R.S. 47:2110 was proper.

This dichotomy precipitates the "Questions Presented" by this application for writs:

If when this suit was filed, there was such ambiguity in the statutory scheme requiring the intervening *Lowrey* decision to define the remedy available to a taxpayer, has Louisiana met the constitutional mandate to provide a "plain, adequate and complete" remedy?

Should petitioners be deprived of a hearing on the merits of their "lack of equal protection" claim based on the retroactive application of a decision defining rights under the legislative shceme defining taxpayers' rights to judicial access?"

ARGUMENT

It has been common knowledge for some time that the administration of the Louisiana tax system has not been in compliance with its legislative requirements, or the

standards set by the supervising Lousiana Tax Commission.[8]

This suit was instituted by these petitioners for the sole purpose of utilizing the tools available to them in an attempt to rectify this situation.

FEDERAL PRINCIPLES

That a statute may be constitutional on its face, but administered in such a manner as to violate the Due Process Clause of the Fourteenth Amendment as well as the Equal Protection Clause of the Fourteenth Amendment, is a principle long-established by the federal jurisprudence. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). This basic tenet has been consistently applied by this Court in the context of uniform taxation as early as *Sunday Lake Iron Co. v. Wakefield TP,* 247 U.S. 350 (1918) and *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441 (1923), and now their progeny, and is presently subject to review before this Court in the consolidated cases of *East Kentucky Energy Corp. v. County Commissioner of Webster County* (Docket No. 87-1310) and *Allegheny Pittsburgh Coal Co. v. County Commissioner of Webster County, West Virginia* (Docket No. 87-1303).

LOUISIANA BASIC PRINCIPLES

Following the guidelines of *Yick Wo, Sunday Lake,* and *Sioux City,* Louisiana jurisprudence has recognized and applied the basic principle that its statutes may be administered in an unconstitutional manner, and has applied

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[8] Although in another context, the three judge federal court in *Scarnato v. Parker,* 415 F.Supp. 272 (M.D. La. 1976), so recognized, and in the same year, the Louisiana Court of Appeal in *Probst v. City of New Orleans,* 325 So.2d 665 (La. App. 4th Cir. 1976, 337 So.2d 1081), enunciated the same concept.

this concept in the context of determining the validity of ad valorem taxation. *Dixon v. Flournoy,* 176 So.2d 138 (La. 1965) (citing *Soux City, et als,* in footnote p. 140); *Bussie v. Long,* 286 So.2d 689 (La. App. 1st Cir. 1974); *Probst v. City of New Orleans,* 325 So.2d 665 (4th Cir. La. 1976).

The following is language of the court below recognizing the Louisiana position:

> We make no argument with plaintiffs' foundational principle that "if both the standard of true value and the uniformity and equality required by law cannot be achieved, equality and uniformity is preferred under the law." *Sioux City Bridge Company v. Dakota County, Neb.,* 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Probst v. City of New Orleans,* 337 So.2d 1081 (La. 1976); *Bussie v. Long,* 286 So.2d 689 (La. App. 1st Cir. 1973), writ denied, 288 So.2d 354 (La. 1974).

Westminister Management Corp. v. Mitchell, 525 So.2d 1171, 1173 (La. App. 4th Cir. 1988).

PLAIN, ADEQUATE AND COMPLETE REMEDY

Unlike the West Virginia cases, this case has not reached the point of judicial determination of whether there has been deliberate and intentional misapplication of the assessment process. It has ended on a procedural note, and the validity of this conclusion is the issue now presented. After reviewing the legislation and the cases interpreting it, and of course the Louisiana constitutional provisions, the petitioners in this case alleged as follows:

> In any event, in 1986, the Assessor for the First District, Mr. Kenneth Carter, generally applying recognized appraisal procedures with

reasonable uniformity, reappraised all of the major office buildings located in the Central Business District. A substantial protion of the remaining real property in and for his Assessment District was reappraised by Mr. Carter with the assistance of the Louisiana Tax Commission. Plaintiffs allege on information and belief that the Assessors for some or all of the other Assessment Districts failed to request the assistance of the Louisiana Tax Commission to aid in the reappraisal of the real property in and for their respective Assessment Districts. The Assessors for some or all of the other Assessment Districts failed to apply generally recognized appraisal procedures on uniform basis and systematically and intentionally undervalued the real property in and for their respective Assessment Districts.

As a direct result of the systematic and intentional failure of some or all of the Assessors for the Second, Third, Fourth, Fifth, Sixth and Seventh Municipal Assessment Districts, to apply the proper appraisal procedures uniformly in order to determine the fair market value of real property in and for their respective Assessment Districts, a complete lack of uniformity resulted between the assessed valuations of the real property in the First District in relation to the assessed valuations of the real property in and for some or all of the other Assessment Districts, and a complete lack of uniformity resulted among the other Assessment Districts themselves.[9]

Based upon these allegations, they prayed for the folowing relief:

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[9]Petition, Appendix A, p. A-7.

> WHEREFORE, Plaintiffs pray that after due proceedings be had, there be judgment herein in favor of each Plaintiff and against Defendant, Paul C. Mitchell, Jr., Director of Finance of the City of New Orleans, ordering, adjudging and decreeing that the appraisal procedures and the enforcement thereof by the Assessors of the Second, Third, Fourth, Fifth, Sixth and Seventh Municipal Assessment Disticts of the City of New Orleans are unconstitutional in violation of Article VII, Section 18(A), Article VII, Section 18(B) of the Louisiana Constitution of 1974 and Article I, Section 3 of the Louisiana Constitution of 1974 and in contravention of the Equal Protection and Due Process Clauses of the United States Constitution, that is the Fourteenth Amendment of the Constitution of the United States, and further ordering and directing the refund by Defendant to each Plaintiff of the full amount of the protested payment set forth opposite the name of each Plaintiff on Exhibit "A" or such amount as may be found due together with interest at the rate of two (2%) percent per annum from the date of payment under protest by such plaintiff until paid, plus all costs of these proceedings and for all general and equitable relief.[10]

This suit so alleging was filed relying on the explicit language of La. R.S. 47:2110, that it provided a remedy by which a taxpayer could contest either the correctness or the legality of his taxes, and that all issues so raised could be determined pursuant to said statute. La. R.S. 47:2110 by its very language was clearly an attempt to meet the 'plain, adequate and complete' test.

Until a point in time (the decision in *Lowrey*) which

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[10] Petition, Appendix A, p. A-13.

occurred after this suit was filed, there appeared to be available in petitioners two roads to the judicial determination of both the correctness and legality of their ad valorem taxes: either via La. R.S. 47:1998 - an appeal from the Louisiana Tax Commission to the district court within thirty days of that decision, or via La. R.S. 47:2110 - the payment of their taxes under protest and notice of the intention to sue, and the institution of the suit within thirty days of the payment of these taxes.

The latter remedy by its own terms is in addition to La. R.S. 47:1998, and relying on that specific language, these petitioners instituted this suit. These statutes were the only avenues provided to enable an aggrieved ad valorem taxpayer to reach the courts for adjudication of their complaint.

Louisiana courts have held that there was no right to a declaratory judgment to establish the legality of the taxing process, but that La. R.S. 47:2110 was the proper remedy. In *Giraud v. City of New Orleans,* 359 So.2d 294, 296 (La. 1975), the Louisiana Supreme Court said:

> "With regard to the question of whether the declaratory judgment is an appropriate vehicle for bringing this claim, we agree with the trial court that the remedy provided by La. R.S. 47:2110 is the *exclusive* method for attacking the action of the taxing authorities here...."

However, the court below evaded this clear holding by deciding that La. R.S. 47:2110 applied to "non-correctness" issues only, and dismissed petitioners' action as one to establish the correctness of their asessments. Petitioners have contended that their's was not an attack on the *amount* of their asessment, i.e., nor its

correctness as determined by *petitioners' assessor,* but to the contrary, on the manner in which other assessors acted in not meeting prescribed assessment standards, so that as to petitioners, the *ad valorem* tax imposed on them was based on assessments which were not uniform and, therefore, illegal, null and void. Apparently the court below felt that since the result of the litigation would adjust petitioners' taxes pursuant to the holding of *Sioux City,* that it was therefore a correctness issue. In this connection, it is imperative to consider that both of these statutes, R.S. 47:1998 and R.S. 47:2110, require a payment of the taxes under protest and the escrow of the "*amount of taxes in conflict.*" From the outset, the petitioners contended that the total amount of the tax was in contest on the ground that the tax was null and void. In holding that the entire tax was in dispute, the Louisiana Court of Appeal for the Fourth Circuit recognized that this was a case where the petitioners were clearly contending that the taxes were illegal, and stated:

> "A fair reading of this pleading leaves no doubt whatsoever that the *entire* amount of property tax paid in 1987 is being disputed by relators not just the difference between their 1986 and 1987 tax bills. The suit challenges the validity of the entire assessment process as applied in the City of New Orleans, on both State and Federal constitutional grounds. The petition also alleges statutory deficiences in the millage adjustment procedures which taxing authorities are constitutionally required to conduct from time to time." (Emphasis ours)[11]

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[11] Appendix C., p. A-38. The Louisiana Supreme Court reversed, and held the amount in dispute, i.e., the amount to be held in escrow, was not the full amount of the taxes paid, but an amount which could not exceed the difference between the 1987 taxes and the prior year's taxes (1986).

Ignoring its opinion in the first *Westminster* case, pretermitting completely the language of *Giraud*, supra, another section of the same Court of Appeal in the decision below held:

> Thus, the pivotal issue is whether plaintiffs' challenge is for "correctness," Plaintiffs do not challenge the right of the State or any of its political subdivisions to obtain revenue by way of ad valorem taxation. Plaintiffs do not question the methods of enforcement of ad valorem taxes. Plaintiffs complain that their assessments are unequal and not uniform relative to assessments of similar classes of property in adjacent assessment districts. Plaintiffs' complaint is a "correctness" challenge.
>
> Plaintiffs argue that they are not challenging correctness - their assessments are correct, other assessments are incorrect, too low. Plaintiffs argue that their challenge is of constitutional magnitude resulting from inequality and non-uniformity, invoking the due process and equal protection clauses of the state and federal constitutions. . . .We find, however, that plaintiffs incorrectly construe this and other "constitutional" principles to argue that their challenge is not for "correctness." "Correctness" includes both the standard of true value and the uniformity and equaltiy required by law. The achievement of both is the goal, the absence of either creates incorrectness. That uniformity and equality are given higher priority than true value does not make an attack on the former rather than the latter something other than a challenge for "correctness."

> We do not find significant distinction between this case and *Lowrey Chevrolet, Inc. v. Brumley,* above.

Westminster Management Corporation v. Mitchell, supra.

In Churchill Farms v. Louisiana Tax Commission, 338 So.2d 963, 966 (La. App. 4th Cir. 1976), the Court forcefully expressed petitioners' position:

> No taxpayer should be put in the position of submitting and being taxed on a 100-percent valuation of his property when the prevalent practice is to pay tax on a significantly smaller value base set by the local assessor. Nor should he be denied a hearing on the excuse he failed to comply with a law that is universally ignored. This effectively deprives him of his day in court. Thus if we limit 47:2110 to a situation attacking the law itself rather than interpreting it to include an attack on unconstitutional methods of enforcement (assessment), we sanction an unconstitutional taking of property without due process because we would in effect say the taxpayer's only remedy is that specified in 47:1998.
>
> Therefore, we conclude the language of 47:2110 gave a taxpayer the right to question not only the validity of the law itself but also the constitutionality of the administration of a valid tax law. The plaintiff's petition does state a cause of action.

Petitioners' action is clearly one for determination of non-correctness, that is, legality of assessment procedures, for these reasons:

1. In petitioners' complaint, it is clear that they do not contest the "correctness" of the assessment imposed by their own assessor, but in fact alleged that it was apparently correct.

2. The relief which they seek is the determination that the tax structure requiring an appraisal at fair market value and an assessment at an appropriate percentage of this amount, was administered in such a manner by the assessors other than petitioner's that it violates the basic principles of equality under the law, and that, therefore, their taxes were illegal, null and void — thus, until the tax system was correctly applied, petitioners were entitled to the relief which this court had declared in *Sioux City, supra.*

3. Both statutes provide a procedure to test the validity of the application of the tax statutes and require declaration of an amount in contest, so that the appropriate amount of taxes could be held in escrow pending a determination of the dispute. This is not determinative that an action is one for correctness.

4. This case raises a Fourteenth Amendment question and Article VII of the Louisiana Constitution question, and that by it, these petitioners, representing a substantial element of the taxing community, seek a "legal" solution to their problem rather than a monetary determination of the correctness of their assessment.

PROVISION OF A PLAIN, ADEQUATE AND COMPLETE REMEDY

This Court, in *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293 (1943), has clearly held that La. R.S. 47:2110 provides such a clear, adequate and speedy

remedy. In this connection, the court said:

> Without raising that issue here we pass at once to the question, submitted to counsel, whether the declaratory judgment procedure may be appropriately resorted to in the circumstances of this case.
>
> In answering it the nature of the remedy afforded to taxpayers by state law for the illegal exaction of the tax is of importance. Section 18 of Article 10 of the Constitution of Louisiana of 1921 directs that: "The Legislature shall provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him." Act 330 of 1938, sets up a complete statutory scheme to carry into effect the constitutional provision . . .[12/]

Can the remedy be *clear* when the decision below is diametrically different from prior Louisiana Supreme Court and Court of Appeal decisions, and a decision of this Court that the statute relied upon provided the appropriate remedy?

Assuming for the purpose of argument only, this is a "correctness" action, the decision below is neverthless wrong. La. R.S. 47:1998 and La. R.S. 47:2110 both provide a remedy for correctness. The supplemental and amended petition filed in this case clearly alleges that petitioners appealed to the Board of Review and to the Louisiana Tax Commission and petitioners supported this allegation by

---

12/ Act 330 of 1938 is codified as Revised Statutes Title 47, Section 2110.

filing copies of the respective decisions of those two administrative bodies, each of which, in their own inimitable way, recognized that petitioners' 'equal protection of the law' contention was valid, and the Louisiana Tax Commission went so far as to say that while they would take action to determine this, they would not give any relief because the petitioners did not sustain an undefined and unprovided "burden of proof"; before them.[13]

Regardless of the approach to the basic premises of this lawsuit, whether correctness or non-correctness, at the time the suit was filed, both statutes were available to the petitioners. It was not until *Lowrey* that any court had held that the exclusive remedy for "correctness" was an appeal from the Louisiana Tax Commission decision, and this despite the clear unequivocal language of La. R.S. 47:2110 providing that it was an additional remedy to La. R.S. 47:1998 for either correctness or illegality.

Lowrey is not prima facie, but conclusive proof that the remedy provided by Louisiana *was not clear,* and *was not complete.* If it took this decision of *Lowrey* after all of the past litigation to recognize the exclusiveness of R.S. 47:1998 as the only remedy of correctness, it was obviously not a "clear" remedy, and inasmuch as Louisiana Constitution Article VII, section 18(E) relates to "correctness" and R.S. 47:1998 is to apply to correctness, it is not a *complete* remedy because it took the legislature in R.S. 47:2110 to enable the courts to decide all issues relating to taxes whereas R.S. 47:1998 could not reach to this extent.

Thus, *Lowrey* alone stands as evidence that Louisiana had not provided its taxpayers with a clear and complete remedy.

---

13 Amended Petition, Appendix B, pages A-30 and A-33.

But reliance on *Lowrey* goes beyond the correctness — illegality question, and applied to this existing case, based upon statutes which must be construed as constitutional until declared otherwise, is a retroactive application of a procedural requirement, which by causing the dismissal of this suit, we contend, deprives petitioners of due process of law.

The retroactive application of a decision in cases such as this has been reprobated by both state and federal jurisprudence.

In *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), this court stated that in determining whether a decision should be applied retroactively, three separate factors should be considered:

First, the decision should not have retroactive application if it establishes a new principle of law, either by overruling a clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Second, a court must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further retard its operation.

Third, a court must weigh the inequity imposed by retroactive application, for '[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretro-

activity." (404 U.S. 97, 106 - 107).

After *Chevron,* this court decided *Rodrigue v. Aetna Casualty & Surety Company,* 395 U.S. 352 (1969). It was held that a state law applied to fixed structures in the Outer Continental Shelf under the Outer Continental Shelf Land Act. Under *Rodrigue,* the action would have prescribed by Louisiana's one year statute of limitation for personal injuries. However, the *Chevron* decision held that the decision in *Rodrigue* should not be applied to retroactively. The *Chevron* court in reaching its decision said:

> "It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was rely on the law as it then was."

Clearly its reasoning applies to this case. The plaintiff relied on the clear and consistent interpretation of La. R.S. 47:2110 as approved by Louisiana courts in *Giraud, supra,* as well as in *Churchill Farms, Inc. v. Louisiana Tax Commission, supra.* We urge that the same principles be applied in this matter as were applied in *Chevron* for the reason that any other result". . .would produce the most 'substantial inequitable results' . . ." *Cipriano v. City of Houma,* 395 U.S. 701 (1969). To hold that the petitioners here have lost the right to pursue this claim because of a hypertechnical procedural error not reasonably foreseeable under the then existing statutory scheme or jurisprudence would certainly cause grievous injusice.

CONCLUSION

Petitioners urge that this court should grant its writs for the reason that serious constitutional rights are involved and serious constitutional issues are herein presented.

Respectfully submitted,

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COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on the Solicitor General of the United States, The Attorney General of the State of Louisiana, and all counsel of record in this proceeding by depositing a copy of same, duly addressed to each of them, in the United States Mail, First Class, postage prepaid, this 29th day of December, 1988.

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NO. 88-1102

Supreme Court, U.S.
FILED
DEC 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

WESTMINSTER MANAGEMENT CORPORATION, ET ALS,
Petitioners,

v.

PAUL C. MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS, AND ATTORNEY GENERAL WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

APPENDIX

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APPENDIX A

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

No. 87-3697 DIVISION " " DOCKET NO.

WESTMINSTER MANAGEMENT CORPORATION, LePAVILLON HOTEL, JERRY C. BILBE, SHEILA B. BELLARIE, KATHLEEN M. BILBE AND MARY D. BILBE, STEDMAN MANAGEMENT COMPANY, INC., REGENT YORK INCORPORATED, NEW ORLEANS DIAMOND AND JEWELRY WHOLESALERS, INC., TURNGEMEINDE PARTNERSHIP IN COMMENDAM, HARTWIG MOSS INSURANCE AGENCY, LTD., W. R. ZANES & CO. OF LA., INC., BERNOS INVESTMENT CORPORATION, SIX-O-ONE JULIA CORPORATION, T. D. BICKHAM CORPORATION, AITKENS REALTY CO., INC., COMMODORE THOMAS J. LUPO ENTERPRISES, NEW ORLEANS RIVERCENTER, INTERNATIONAL RIVERCENTER, GARON AND BRENER, JOHN C. LOVELL, JR., CHARLES A. KRONLAGE, JR., J. A. HOERNER CO., INC., JAMES M. BER, DELTA THEATRES, INCORPORATED, THOMAS D. CHURCH, NATIONAL MEAT ANS PROVISION CO., A. T. GREEN, JR., ODECO BUILDING CORP., 210 BARONNE STREET LIMITED PARTNERSHIP, LINCOLN PROPERTY COMPANY C.S.E., INC., CANARLES REALTY CORP., KILLIAN L. HUGER, JR., DIXIE ART SUPPLIES, INC., PLACE ST. CHARLES, A LOUISIANA PARTNERSHIP, THE GRAND LODGE OF THE STATE OF LOUISIANA, JOSEPH C. CANIZARO INTERESTS, CLIFF PROBST, INC., EBEN T. WATKINS and FNBC, TRUSTEE

VERSUS

PAUL C. MITCHELL, JR.,
DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS

FILED: _____ _____
DEPUTY CLERK

PETITION FOR REFUND OF TAXES PAID UNDER PROTEST

The petition of those persons, real or juridical, identified as Plaintiff in the caption, and further identified as Plaintiff and having the requisite capacity to sure as shown on Exhibit "A" attached to this petition and made a part hereof as if same were recited herein *in extenso,* respectfully represents that:

1.

Defendant is the Director of Finance of the City of New Orleans and is the officer designated by law for the collection of ad valorem real estate taxes (the "Real Property Tax(es)") in the City of New Orleans for the year 1987. Defendant Mitchell is officially domiciled in the Parish of Orleans and is the sole necessary and proper party defendant in this suit pursuant to La. R. S. 47:2110B.

2.

Each Plaintiff is or represents the owner of real property located in the First Municipal Assessment District (the "First District") in the City of New Orleans (all references to the City of New Orleans shall include references to the Parish of Orleans, the city and parochial geographic boundaries of same being entirely coterminous).

3.

Each Plaintiff herein paid under protest to Defendant on the date set forth on Exhibit "A" opposite his

name, the amount in U.S. dollars shown opposite his name for the 1987 City of New Orleans Real Property Taxes on real property resulting from an assessment against said real property owned by each Plaintiff and located in the First District in the City of New Orleans, as more particularly identified by the tax bill number shown opposite his name, on Exhibit "A" hereto.

4.

Each Plaintiff paid under protest his Real Property Taxes on the date set forth on Exhibit "A" opposite his name, and at the same time each Plaintiff delivered to Defendant a notice of protest and of his intention to file suit for refund of the Real Property Taxes paid under protest.

5.

This suit is being filed within thirty (30) days of the aforesaid remittances under protest, and, therefore, the defendant must continue to hold the protested payments in escrow pending the outcome of this suit.

6.

At the time each Plaintiff paid his Real Property Taxes, they were due but not delinquent.

7.

Defendant is indebted to each Plaintiff for the refund of the Real Property Taxes that were paid under protest plus interest on the amount of each said refund at the rate of two (2%) percent per annum from the date of payment until refunded in full for the reasons hereinafter set forth.

8.

Each Plaintiff claims refund for the Real Property Taxes on real property located in the First District of the City of New Orleans pursuant ot La. R.S. 47:2110.

9.

The Louisiana Constitution of 1974 in Article VII, Section 18(A) requires real property subject to the Real Property Tax to be listed on the tax rolls at its assessed valuation, which valuation is a percentage of its fair market value. Said provision of the Louisiana Constitution mandates that the percentaage of fair market value listed on the tax rolls is to be uniform throughout the State upon the same class of property. The Louisiana Constitution of 1974, further provides, in Article VII, Section 18 (B), the classifications of property subject to the Real Property Tax and the percentage of fair market value applicable to each classification for the purpose of determining assessed valuation: land and residential property 10% of fair market value, all other property 15% of fair market value.

10.

As set forth in La. R.S. 47:1901, the City of New Orleans is divided into seven (7) assessorial districts (the "Assessment Districts") with an elected assessor (the "Assessor") for each Assessment District. Each of the Assessors is empowered by La. R.S. 47:1909 to assess and list the property on the tax rolls in and for his or her respective Assessment District.

11.

In assessing the property in and for each Assess-

ment District, the various Assessors are required by La. R.S. 47:2323B to determine the fair market value of such property by following the uniform guidelines, procedures and rules and regulations which have been promulgated by the Louisiana Tax Commission. Such criteria for determining fair market value are required by La. R.S. 47:2323A to be applied uniformly throughout the State. Additionally, the Assessors are required by La. R.S. 1957B to list and assess all property subject to taxation at the proper percentage of its fair market value as required by the Louisiana Constitution of 1974.

12.

Upon the proper determination of the assessed valuation of property subject to the Real Property Tax, said valuation is multiplied by the applicable millage rate set by law in effect for the particular taxing jurisdiction in order to compute the actual amount of the Real Property Taxes due on the property in question for a given tax year.

13.

Pursuant to Article VII, Section 18(F) of the Louisiana Constitution of 1974 and La. R.S. 47:2331, the taxable year 1986 is designated a quadrennial reappraisal year and all real property subject to the Real Property Tax located in the City of New Orleans was required to be reappraised in 1986 to determine its fair market value for purposes of computing the assessed valuations of such property.

14.

Each of the Assessors was required to reappraise all the real property in and for their respective Assessment

Districts in 1986, using uniform guidelines, procedures and rules and regulations promulgated by the Louisiana Tax Commission.

15.

Plaintiffs allege on information and belief, that the Louisiana Tax Commission failed, prior to or in connection with the 1986 quadrennial reappraisal, to provide implementation, supervision and enforcement of adequate guidelines, procedures and rules and regulations to enable the Assessors to uniformly determine the fair market value of the various classifications of real property subject to the Real Property Tax. As a consequence of such failure(s) by the Louisiana Tax Commission, or in direct violation of such guidelines, the various Assessors were unable or failed to properly reappraise, in 1986, the real property located in their respective Assessment Districts in the manner required by law.

16.

Plaintiffs allege on information and belief, that the Louisiana Tax Commission failed, in connection with the 1986 quadrennial reappraisal, to provide technical assistance to the Assessors for some or all of the Assessment Districts to ensure accurate reappraisals of the real property in some or all of the Assessment Districts, as required by La. R.S. 47:1837B.(2)(d). As a consequence of such failure by the Louisiana Tax Commission, the various Assessors for some or all of the Assessment Districts were unable or failed to properly reappraise, in 1986, the real property located in their respective Assessment Districts in the manner required by law.

17.

In any event, in 1986, the Assessor for the First District, Mr. Kenneth Carter, generally applying recognized appraisal procedures with reasonable uniformity, reappraised all of the major office buildings located in the Central Business District. A substantial portion of the remaining real property in and for his Assessment District was reappraised by Mr. Carter with the assistance of the Louisiana Tax Commission. Plaintiffs allege on information and belief that the Assessors for some or all of the other Assessment Districts failed to request the assistance of the Louisiana Tax Commission to aid in the reappraisal of the real property in and for their respective Assessment Districts. The Assessors for some or all of the other Assessment Districts failed to apply generally recognized appraisal procedures on uniform basis and systematically and intentionally undervalued the real property in and for their respective Assessment Districts.

18.

As a direct result of the systematic and intentional failure of some or all of the Assessors for the Second, Third, Fourth, Fifth, Sixth and Seventh Municipal Assessment Districts, to apply the proper appraisal procedures uniformly in order to determine the fair market value of real property in and for their respective Assessment Districts, a complete lack of uniformity resulted between the assessed valuations of the real property in the First District in relation to the assessed valuations of the real property in and for some or all of the other Assessment Districts, and a complete lack of uniformity resulted among the other Assessment Districts themselves.

19.

The systematic undervaluation of real property by some or all of the Assessors, other than the First District Assessor, has resulted in a lack of uniformity in the percentage of fair market value listed on the tax rolls for real property of a similar class located within the City of New Orleans and a deviation from the percentage of fair market value of real property required to be listed on the tax rolls.

20.

As a result of the quadrennial reappraisal made in 1986, the total amount of assessments increased in the City of New Orleans, and, pursuant to the provisions of Article VII, Section 23(B) of the Louisiana Constitution, the millage rates levied by each Property Tax recipient body in the City of New Orleans for 1987 were required to be reduced (the "Rollback Adjustment") so that the total Real Property Taxes for 1987 would not exceed the total Real Property Taxes for 1986.

21.

Article VII, Section 23(C) of the Louisiana Constitution and La. R.S. 9:1705 provides a mechanism for the Property Tax recipient bodies to thereafter increase the millage rates for 1987 to the millage rates in effect in 1986 (the "Rollforward Adjustment").

22.

Plaintiffs allege that the City Council of the City of New Orleans, the Orleans Parish School Board and the Board of Commissioners of the Orleans Parish Levee Board, as the taxing authorities for all of the millages

levied and comprising the 1987 Real Property Tax, in adopting millages for 1987, failed to comply with Acts 1981, No. 433 and Acts 1981, Ex. Sess. No. 28, and, as a result, the maximum millage for 1987, cannot exceed the Rollback Adjustment which has yet to be established as required by law.

23.

Plaintiffs further allege that the City Council of the City of New Orleans, the Orleans Parish School Board and the Board of Commissioners of the Orleans Parish Levee Board, in adopting millages for 1983 following a quadrennial reappraisal in 1982, failed to comply with Acts 1981, No. 433, and Acts 1981, Ex. Sess. No. 28, and, as a result, the maximum millages for 1983 could not exceed the Rollback Adjustment which has yet to be established as required by law.

FIRST CAUSE OF ACTION

24.

The complete lack of uniformity between assessed valuations of real property in the First District in relation to assessed valuations of real property in the other Assessment Districts is in purposeful disregard of the mandate of Article VII, Section 18(A) of the Louisiana Constitution of 1974.

25.

As a result of the foregoing, the assessments on real property in the City of New Orleans and, in particular, the assessments of Plaintiffs are invalid, unenforceable and without force and effect.

26.

As a consequence of the foregoing, there is no lawful or legal basis upon which to levy Real Property Taxes against Plaintiffs' respective properties.

SECOND CAUSE OF ACTION

27.

The systematic and purposeful undervaluation of real property in and for the City of New Orleans in all or most of the Assessment Districts but the First District results in an illegal and unlawful deviation from the percentage of fair market value of such property required to be listed on the tax rolls by Article VII, Section 18(B) of the Louisiana Constitution of 1974 and La. R.S. 47:1957B.

28.

As a result of the foregoing, the assessments on real property in the City of New Orleans and in particular, the assessments of Plaintiffs are invalid, unenforceable and without force and effect and there is no basis upon which to levy Real Property Taxes againsts Plaintiffs' respective properties.

THIRD CAUSE OF ACTION

29.

The amount of Real Property Taxes claimed due by Defendant from Plaintiffs for taxable year 1987 is a direct consequence of the systematic undervaluation of the real property in and for the City of New Orleans in all or most of the Assessment Districts other than the First District.

30.

The substantive effect of this purposeful discrimination by the Assessors for all or most of the Assessment Districts is that Plaintiffs' real property located in the First District is illegally burdened with Real Property Taxes in excess of the amount of Real Property Taxes which the law requires their real property to bear.

31.

This unequal taxation of Plaintiffs' real property and intentional deviation from the uniformity requirements of the Louisiana Constitution of 1974 and statutes thereunder result in an illegal disparity of taxation between individuals and businesses in the First District and similarly situated individuals and businesses in the other Assessment Districts in contravention of Plaintiffs' right to equal protection of the laws guaranteed by Article I, Section 3 of the Louisiana Constitution of 1974.

32.

As a result of the foregoing, the assessments of Plaintiffs are invalid, unenforceable and of no force and effect.

33.

As a consequence of the foregoing, there is no lawful or legal basis upon which to levy Real Property Taxes against Plaintiffs' respective properties.

FOURTH CAUSE OF ACTION

34.

The unequal taxation of Plaintiffs' real property and intentional deviation from the uniformity requirements of the Louisiana Constitution of 1974 and statutes thereunder result in an illegal disparity of taxation between individuals and businesses in the First District and similarly situated individuals and businesses in the other Assessment Districts in contravention of the Equal Protection and Due Process Clauses of the United States Constitution applied to the state of Louisiana through the Fourteenth Amendment of the United States Constitution.

35.

As a result of the foregoing, the assessments of Plaintiffs are invalid, unenforceable and of no force and effect.

36.

As a consequence of the foregoing, there is no lawful or legal basis upon which to levy Real Property Taxes against Plaintiffs' respective properties.

FIFTH CAUSE OF ACTION

37.

As a result of Plaintiffs' allegations in Paragraphs 20 and 21, taken together, Plaintiffs allege that the maximum millages for 1987 established by the City of New Orleans, the Orleans Parish School Board and the Board of Commissioners of the Orleans Levee Board are improper and

unlawful as being in excess of the maximum millages which may be levied in 1987.

38.

The unlawful millages applied to the assessed valuation of Plaintiffs' real property located in the First District render the Real Property Tax claimed due by Defendant from Plaintiffs excessive and illegal.

WHEREFORE, Plaintiffs pray that after due proceedings be had, there be judgment herein in favor of each Plaintiff and against Defendant, Paul C. Mitchell, Jr., Director of Finance of the City of New Orleans, ordering, adjudging and decreeing that the appraisal procedures and the enforcement thereof by the Assessors of the Second, Third, Fourth, Fifth, Sixth and Seventh Municipal Assessment Districts of the City of New Orleans are unconstitutional in violation of Article VII, Section 18(A), Article VII, Section 18(B) of the Louisiana Constitution of 1974 and Article 1, Section 3 of the Louisiana Constitution of 1974 and in contravention of the Equal Protection and Due Process Clauses of the United States Constitution, that is the Fourteenth Amendment of the Constitution of the United States, and further ordering and directing the refund by Defendant to each Plaintiff of the full amount of the protested payment set forth opposite the name of each Plaintiff on Exhibit "A" or such amount as may be found due together with interest at the rate of two (2%) percent per annum from the date of payment under protest by each plaintiff until paid, plus all costs of these proceedings and for all general and equitabale relief.

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PLEASE SERVE:

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Director of Finance of the
City of New Orleans
City Hall
1300 Perdido Street
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EXHIBIT "A"

PLAINTIFF	PROCEDURAL CAPACITY	DATE OF PAYMENT OF TAXES	DOLLAR AMOUNT OF TAXES	TAX BILL NUMBER(S)
Westminster Management Corporation	Agent	1/30/87	$72,870.88	R 1-05-1-021-13 1-05-1-021-03 1-05-1-021-06
Westminster Management Corporation	Agent	1/30/87	$32,639.94	1-05-1-017-05
Westminster Management Corporation	Agent	1/30/87	$128,582.37	1-05-1-021-04
Westminster Management Corporation	Agent	1/30/87	$110,667.35	1-05-1-021-01 1-05-1-021-02 1-05-1-021-14 1-05-1-021-19
Westminster Management Corporation	Agent	1/30/87	$ 83,707.13	1-05-1-019-12 1-05-1-019-13 1-05-1-019-15 1-05-1-019-29
Westminster Management Corporation	Agent	1/30/87	$ 25,584.47	1-04-1-024-12 1-04-1-024-14 1-04-1-024-15 1-04-1-024-16

PLAINTIFF	PROCEDURAL CAPACITY	DATE OF PAYMENT OF TAXES	DOLLAR AMOUNT OF TAXES	TAX BILL NUMBER(S)
Westminster Management Corporation	Agent	1/30/87	$676,094.00	1-05-1-020-01 1-05-1-020-02 1-05-1-020-04 1-05-1-020-05 1-05-1-020-06 1-05-1-020-07 1-05-1-020-08 1-05-1-020-09 1-05-1-020-10 1-05-1-020-11 1-05-1-020-12 1-05-1-020-13 1-05-1-020-14 1-05-1-020-15 1-05-1-020-17 1-05-1-020-18 1-05-1-020-19 1-05-1-020-20 1-05-1-020-21
Westminster Management Corporation	Agent	1/30/87	$220,560.34	1-05-1-018-19
Westminster Management Corporation	Agent	1/30/87	$817,794.47	1-04-1-034-03
Westminster Management Corporation	Agent	1/30/87	$720,349.37	1-04-1-034-07

PLAINTIFF	PROCEDURAL CAPACITY	DATE OF PAYMENT OF TAXES	DOLLAR AMOUNT OF TAXES	TAX BILL NUMBER(S)
Westminster Management Corporation	Agent	1/30/87	$746.327.58	1-04-1-035-02
LePavillon Hotel	Agent	1/30/87	$103.498.54	1-04-1-019-01
Jerry C. Bilbe Sheila B. Bellarie Kathleen M. Bilbe Mary D. Bilbe	Owners	1/30/87	$ 13,181.88	1-02-1-018-01 1-04-1-049-04 1-01-1-037-24 1-01-1-040-16 1-05-2-024-27 1-05-2-024-28 1-02-1-028-21 1-02-1-028-22 1-02-1-028-09 1-02-1-028-20 1-02-1-028-07 1-02-1-028-08 1-02-1-028-06 1-02-1-028-04 1-02-1-028-03 1-02-1-028-02 1-01-1-040-14 1-01-1-037-22 1-01-1-026-22 1-01-1-037-01 1-01-1-026-20 1-01-1-026-21

PLAINTIFF	PROCEDURAL CAPACITY	DATE OF PAYMENT OF TAXES	DOLLAR AMOUNT OF TAXES	TAX BILL NUMBER(S)
Stedman Management Company, Inc.	Agent	1/30/87	$ 22,009.87	1-05-1-017-07
Stedman Management Company, Inc.	Agent	1/30/87	$492,325.77	1-05-1-017-09
Regent York Incorporated	Agent	1/30/87	$ 28,918.08	1-03-1-006-06
New Orleans Diamond & Jewelry Wholesalers, Inc.	Owner and/or Agent	1/30/87	$ 4,766.13	1-04-1-011-19
Turngemeinde Partnership in Commendam	Owner	1/30/87	$ 21,675.17	1-03-1-050-14 1-03-1-050-15
Hartwig Moss Insurance Agency, Ltd.	Owner	1/30/87	$ 11,312.86	1-03-1-049-08
W. R. Zanes & Co. of La., Inc.	Owner	1/30/87	$ 5,369.41	1-05-1-007-01
Bernos Investment Corporation	Owner	1/30/87	$ 16,299.90	1-04-1-025-05 1-04-1-025-06 1-04-1-025-17 1-04-1-025-18 1-04-1-025-22

PLAINTIFF	PROCEDURAL CAPACITY	DATE OF PAYMENT OF TAXES	DOLLAR AMOUNT OF TAXES	TAX BILL NUMBER(S)
Six-O-One Julia Corporation	Owner	1/30/87	$ 3.065.85	1-03-1-037-03
T.D. Bickham Corporation	Owner and Agent	1/30/87	$143.246.78	1-05-1-022-08 1-05-1-022-07 1-05-1-022-02
Aitkens Realty Co., Inc.	Owner or Agent	1/30/87	$ 2.583.88	1-03-1-045-05
Aitkens Realty	Owner or Agent	1/30/87	$ 4.980.34	1-03-1-045-06
Commodore Thomas J. Lupo Enterprises	Owner or Agent	1/30/87	$ 25.972.72	1-03-1-034-10
New Orleans Rivercenter	Owner	1/30/87	$156.588.73	1-03-1-001-13
International Rivercenter	Owner	1/30/87	$859.226.31	1-03-1-001-12
Garon and Brener	Owner	1/30/87	$ 8.581.71	1.03-1-048-06
John C. Lovell,Jr.	Agent	1/30/87	$ 4.351.10	1.04-1-007-05
John C. Lovell,Jr.	Agent	1/30/87	$ 4.792.90	1-04-1-007-06
Charles A. Kronlage, Jr.	Owner or Agent	1/30/87	$ 5.971.05	1-03-1-041-06
J. A. Hoerner Co., Inc.	Owner	1/30/87	$ 15.369.42	1-04-1-009-06
James M. Ber	Owner or Agent	1/30/87	$ 946.76	1-05-3-064-24
James M. Ber	Owner or Agent	1/30/87	$ 10.924.20	1-05-3-064-01

PLAINTIFF	PROCEDURAL CAPACITY	DATE OF PAYMENT OF TAXES	DOLLAR AMOUNT OF TAXES	TAX BILL NUMBER(S)
Delta Theatres, Incorporated	Owner	1/30/87	$ 15,503.30	1-05-1-023-01
Thomas C. Church	Agent	1/30/87	$ 34,775.34	1-03-1-010-01
National Meat & Provision Co.	Owner or Agent	1/30/87	$ 1,860.93	1-03-1-030-04
National Meat & Provision Co.	Owner or Agent	1/30/87	$ 2,670.36	1-01-1-052-05 1-01-1-052-07
National Meat & Provision Co.	Owner or Agent	1/30/87	$ 1,456.56	1-01-1-039-14 1-01-1-039-16
National Meat & Provision Co.	Owner or Agent	1/30/87	$ 3,829.54	1-01-1-039-02
A. T. Green, Jr.	Owner	1/30/87	$ 6,760.94	1-03-1-037-15
ODECO Building Corp.	Owner or Agent	1/30/87	$ 1,727.05	1-05-1-036-22
210 Baronne Street Limited Partnership	Owner	1/30/87	$266,004.43	1-05-1-016-02
210 Baronne Street Limited Partnership	Owner	1/30/87	$ 96,167.08	1-05-1-016-09
Lincoln Property Company C.S.E., Inc.	Owner	1/30/87	$873,714.27	1-03-1-059-26
Canarles Realty Corp.	Owner	1/30/87	$ 5,114.22	1-05-1-011-11
Canarles Realty Corp.	Owner	1/30/87	$ 20,845.12	1-05-1-011-15
Killian L. Huger, Jr.	Agent	1/30/87	$ 849.66	1-04-1-048-02
Killian L. Huger, Jr.	Agent	1/30/87	$ 182.07	1-04-1-048-16
Killian L. Huger, Jr.	Agent	1/30/87	$ 5,462.10	1-04-1-048-01
Killian L. Huger, Jr.	Agent	1/30/87	$ 15,235.54	1-04-1-024-03

PLAINTIFF	PROCEDURAL CAPACITY	DATE OF PAYMENT OF TAXES	DOLLAR AMOUNT OF TAXES	TAX BILL NUMBER(S)
Killian L. Huger, Jr.	Agent	1/30/87	$ 736.34	1-04-1-024-01
Killian L. Huger, Jr.	Agent	1/30/87	$ 4,016.40	1-04-1-024-23
Killian L. Huger, Jr.	Agent	1/30/87	$ 4,110.12	1-04-1-024-21
Killian L. Huger, Jr.	Agent	1/30/87	$ 3,855.74	1-04-1-024-22
Killian L. Huger, Jr.	Agent	1/30/87	$ 2,415.56	1-01-1-006-05
Killian L. Huger, Jr.	Agent	1/30/87	$ 72,549.61	1-04-1-023-06
Dixie Art Supplies, Inc.	Owner or Agent	1/30/87	$ 3,855.74	1-04-1-009-04
Dixie Art Supplies, Inc.	Owner or Agent	1/30/87	$ 15,971.88	1-03-1-022-04
Place St. Charles, a La. Partnership	Owner	1/30/87	$1,483,240.47	1-05-1-013-01 1-04-1-015-06 1-04-1-015-07 1-4-1-015-14 1-04-1-015-15
The Grand Lodge of the State of Louisiana	Owner	1/30/87	$ 92,460.00	1-04-1-014-01
Joseph C. Canizaro Interests	Agent	1/30/87	$983,652.65	1-03-1-025-01 1-03-1-027-13
Cliff Probst, Inc.	Agent	1/30/87	$ 13,896.74	1-04-1-026-22
Eben T. Watkins	Owner	12/30/86	$ 3,601.37	1-03-1-038-02
FNBC, Trustee	Trustee	1/30/87	$ 38,798.42	1-04-1-016-08

APPENDIX B

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

No. 87-3697 DIVISION "G" DOCKET NO.4

WESTMINSTER MANAGEMENT CORPORATION, LePAVILLON HOTEL, JERRY C. BILBE, SHEILA B. BELLARIE, KATHLEEN M. BILBE AND MARY D. BILBE, STEDMAN MANAGEMENT COMPANY, INC., REGENT YORK INCORPORATED, NEW ORLEANS DIAMOND AND JEWELRY WHOLESALERS, INC., TURNGEMEINDE PARTNERSHIP IN COMMENDAM, HARTWIG MOSS INSURANCE AGENCY, LTD., W. R. ZANES & CO. OF LA., INC., BERNOS INVESTMENT CORPORATION, SIX-O-ONE JULIA CORPORATION, T. D. BICKHAM CORPORATION, AITKENS REALTY CO., INC., COMMODORE THOMAS J. LUPO ENTERPRISES, NEW ORLEANS RIVERCENTER, INTERNATIONAL RIVERCENTER, GARON AND BRENER, JOHN C. LOVELL, JR., CHARLES A. KRONLAGE, JR., J. A. HOERNER CO., INC., JAMES M. BER, DELTA THEATRES, INCORPORATED, THOMAS D. CHURCH, NATIONAL MEAT AND PROVISION CO., A. T. GREEN, JR., ODECO BUILDING CORP., 210 BARONNE STREET LIMITED PARTNERSHIP, LINCOLN PROPERTY COMPANY C.S.E., INC., CANARLES REALTY CORP., KILLIAN L. HUGER, JR., DIXIE ART SUPPLIES, INC., PLACE ST. CHARLES, A LOUISIANA PARTNERSHIP, THE GRAND LODGE OF THE STATE OF LOUISIANA, JOSEPH C. CANIZARO INTERESTS, CLIFF PROBST, INC., EBEN T. WATKINS and FNBC, TRUSTEE

VERSUS

PAUL C. MITCHELL, JR.,
DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS

Consolidated With:

NO. 87-3727 DIVISION "B" DOCKET NO.
PAN-AMERICAN LIFE INSURANCE COMPANY

VERSUS

CITY OF NEW ORLEANS, ET AL

Consolidated With:

NO. 87-3728 DIVISION "C" DOCKET NO.
PANACON, A LOUISIANA PARTNERSHIP

VERSUS

CITY OF NEW ORLEANS, ET AL

Consolidated With:

NO. 87-3898 DIVISION "A" DOCKET NO.
BEVPAC PROPERTIES

VERSUS

PAUL C. MITCHELL, JR.
DIRECTOR OF FINANCE FOR THE CITY OF NEW ORLEANS

FILED: _____ _____
DEPUTY CLERK

SUPPLEMENTAL AND AMENDED PETITION

The Amended Petition of those persons, real or juridical, identified as Plaintiffs in the above caption and fully identified as Plaintiffs on Exhibit A annexed to the original petition herein, seeking to supplement and amend the original petition herein respectfully represent that:

Allegation 1 of the original petition should be amended to read as follows:

The Defendants are as follows:

(a) The Director of Finance of the City of New Orleans and is the officer designated by law for the collection of ad valorem real estate taxes (the "Real property Tax(es)") in the City of New Orleans for the year 1987. Defendant Mitchell is officially domiciled in the Parish of Orleans and is the sole necessary and proper party Defendant in this suit pursuant to La. R.S. 47:2110B.

(b) The Assessors for the City of New Orleans for their respective district, as set forth below:

ASSESSOR	DISTRICT
Kenneth Carter	1
Claude Mauberret, Jr.	2
Errol Williams	3
Ronald G. Burke	4
James W. Smith	5
Janyce C. Degan	6
E. Henry Heaton	7

(c) The Board of Review for real estate ad valorem taxes for the Parish of Orleans, State of Louisiana, consisting of the following:

COUNCIL	DISTRICT
Dorothy Mae Taylor	Councilwoman At Large
Joseph I. Giarrusso	Councilman At Large
Peggy Wilson	A
James Singleton	B
Mike Early	C
Lambert C. Boissiere, Jr.	D
Johnny Jackson, Jr.	E

(d) The Louisiana Tax Commission whose members are as follows:

Jamar W. Adcock
Carol D. Fisher
Betty J. Lowery
James W. Smith
Mark H. Bonner, Jr.

Allegation 3 of the original petition should be amended to read as follows:

The Plaintiffs herein appealled their assessment to the Board of Review. The Board of Review after a hearing decided that "the Board has insufficient data on which to base an evaluation of the ratio of assessments to fair market value in other assessment districts, both within Orleans Parish and in other parishes of Louisiana;" (Exhibit 1 hereto).

Thereafter a timely appeal was made to the Tax Commission. At the hearing before the Tax Commission, the

Tax Commission ruled: "after considering the exhibits filed by the protesters and the arguments and memorandum of the attorneys, the Commission finds that there is an indication that assessments may be unequal between districts. However, the Commission does not find that the weight of the evidence presented establishes inequality of assessment and therefore the decision of the Board of Review is upheld."(Exhibit 2 hereto).

Consistent with the last paragraph of their decision dated October 28, 1986, on May 4, 1987, "the Tax Commission..." ordered "a reappraisal of all property for the 1988 tax year, based upon the fair market value as of 1/1/87." (Exhibit 3 hereto).

Each Plaintiff herein paid under protest to Defendant on the date set forth on Exhibit "A" opposite his name, the amount in U.S. dollars shown opposite his name for the 1987 City of New Orleans Real Property Taxes on real property resulting from an assessment against said real property owned by each Plaintiff and located in the First District in the City of New Orleans, as more particularly identified by the tax bill number shown opposite his name, on Exhibit "A" annexed to the original petition.

The following should be substituted for allegation 14 of the original complaint.

Each of the Assessors was required to reappraise all the real property in and for their respective Assessment Districts in 1986, using uniform guidelines, procedures and rules and regulations promulgated by the Louisiana Tax Commission.

Intentionally and systematically, the seven Assessors of the Assessment Districts for the City of New

Orleans have failed and refuse to apply uniformity and equality among the taxpayers in the City of New Orleans, in violation of the regulatory, statutory, and constitutional provisions herein elsewhere cited.

Plaintiffs allege on information and belief, that the Louisiana Tax Commission failed, prior to or in connection with the 1986 quadrennial reappraisal, to provide implementation, supervision and enforcement of adequate guidelines, procedures and rules and regulations to enable the Assessors to uniformly determine the fair market value of the various classifications of real property subject to the Real Property Tax. As a consequence of such failure(s) by the Louisiana Tax Commission, or in direct violation of such guidelines, the various Assessors were unable or failed to properly reappraise, in 1986, the real property located in their respective Assessment Districts in the manner required by law. There has been a discrepancy in the assessment ratios for the various Parishes of Louisiana and more particularly the Parish of Orleans for several years. The Louisiana Tax Commission is the body charged by law with the duty of equalizing taxes and has had knowledge of the continuous variation between the assessment ratios of the several parishes and of the seven Assessment Districts in the Parish of Orleans, and in spite of this knowledge the Louisiana Tax Commission has failed to take any action to equalize taxes. Failure to act on the part of the Louisiana Tax Commission constitutes purposeful discrimination, which results in systematic lack of equality in payment of taxes; that this lack of equality is not in any way accidental or the result of errors in judgment, but is a failure to discharge the duty of the Tax Commission to equalize taxes.

Allegation 39. The additional Defendants hereto, that is, the Assessors for the Parish of Orleans named

above, the Board of Review for the Parish of Orleans named above, and the Louisiana Tax Commission have failed to perform their statutory obligations to provide, either by assessment, or be review thereof, assessment of the properties in the Parish of Orleans at their actual cash value and fair market value on a uniform and equal basis in compliance with Article VII of the Constitution of the State of Louisiana and the Fourteenth Amendment of the United States Constitution. Accordingly, their actions, or their failure to act, are improper and illegal, and the assessments of Plaintiffs' properties are accordingly null, void and invalid.

Allegation 40. All of the other allegations of Plaintiffs' original petition are repeated herein.

WHEREFORE, the premises considered, Plaintiffs pray that this Supplemental and Amended Petition be filed herein, and that same be served upon Paul C. Mitchell, Jr., the original Defendant herein, in his capacity as the Tax Collector for the City of New Orleans, on the Assessors for the Parish of Orleans named above, on the Board of Review for the Parish of Orleans named above, on the Tax Commission and each of its members named above, and after due proceedings had, there be judgment against all of said Defendants and in favor of Plaintiffs, ordering, adjudging and decreeing that the appraisal procedures and the enforcement thereof by the Assessors of the Second, Third, Fourth, Fifth, Sixth and Seventh Municipal Assessment Districts of the City of New Orleans are unconstitutional in violation of Article VII, Section 18(A), Article VII, Section 18(B) of the Louisiana Constitution of 1974 and Article 1, Section 3 of the Louisiana Constitution of 1974 and in contravention of the Equal Protection and Due Process Clauses of the United States Constitution, that is, the Fourteenth Amendment of the Constitution of the United

States, and further ordering and directing the refund by Defendants to each Plaintiff of the full amount of the protested payment set forth opposite the name of each Plaintiff on Exhibit "A" annexed to the original petition, and all parties plaintiff herein, or such amount as may be found due together with interest at the rate of two (2) percent per annum from the date of payment under protest by each Plaintiff until paid, plus all costs of these proceedings and for all general and equitable relief.

/s/ Moise S. Steeg, Jr.
MOISE S. STEEG, JR.
ROBERT M. STEEG
STEEG AND O'CONNOR
201 ST. CHARLES AVENUE
SUITE 3201
NEW ORLEANS, LOUISIANA 70170
(504) 582-1199

/s/ Mitchel W. Herzog
DONALD A. MEYER
MITCHELL W. HERZOG
SHUSHAN, MEYER, JACKSON,
McPHERSON & HERZOG
1010 COMMON STREET
SUITE 1500
NEW ORLEANS, LOUISIANA 70112
(504) 581-9444

A-30

ORLEANS PARISH BOARD OF REVIEW

No. 7
CITY HALL: September 12, 1986

BY: BOARD MEMBERS TAYLOR, SINGLETON, BELLSON AND BOSSIERE

WHEREAS, the Board of Review has received appeals from a number of property owners in the First Municipal District, in which the property owners allege that their properties are unfairly assessed as compared to similar properties in other assessment districts: and

WHEREAS, the Board has reviewed the assessment precedures and policies employed by the assessor and has received the recommendations of its independant consultants on the properties in question: and

WHEREAS, the Board is convinced that the assessor considered and responded to the problems currently being experienced by Central Business District property owners, including the difficult local economy and the unusual vacancy rate, and has placed assessments on the properties which fairly reflect their fair market value, as defined by State law and Tax Commission policies: and

WHEREAS, the Board has insufficient data on which to base an evaluation of the ratio of assessments to fair market value in other assessment districts, both within Orleans Parish and in the other parishes of Louisiana: and

WHEREAS, the Board appreciates the importance of equal assessment of all properties within the State: and therefore

BE IT RESOLVED BY THE ORLEANS PARISH BOARD OF REVIEW that the Board respectfully requests that the Louisiana Tax Commission pay special attention to the allegations of these property owners when the 1987 tax rolls are reviewed.

THE FOREGOING RESOLUTION WAS READ IN FULL, THE ROLL WAS CALLED ON THE ADOPTION THEREOF AND RESULTED AS FOLLOWS:

YEAS: 6

NAYS: 0

ABSENT: 1

AND THE RESOLUTION WAS ADOPTED.

Louisiana Tax Commission

James W. Adoock, Chairman
Carol D. Fisher, Memberr
Betty J. Lewery, Member
James W. Smith, Member
Mark H. Bonner, Jr., Member
Ann R. Lavespara, Executive Secretary

Baton Rouge Office
P. O Box 64788
Baton Rouge, La. 70696
Novemebr 12, 1986

Mr. Mitchell W. Herzog
1010 Common Street - Suite 1500
New Orleans, Louisiana 70112

Re: Appeal of 1987 Assessed Valuation
Westminister Management
Docket No. 86-020
Orleans, Parish - 1st M. D.

Dear Mr. Herzog:

Enclosed herewith is a certified copy of the Commission's decision on the above captioned matter, which was heard in New Orleans on October 28, 1986.

You have the right to appeal this decision to the district court within thirty (30) days of the date of this letter.

Sincerely,

/s/ James W. Smith

James W. Smith
Member

JWS/jkb

EXHIBIT 2
November 17, 1986

LOUISIANA TAX COMMISSION
STATE OF LOUISIANA

IN RE:	:	DOCKET NO. 86-020-1
PROTEST OF	:	TAX BILL REF. NO. 1-05-1-020-20
WESTMINISTER MANAGEMENT CORP.	:	

DECISION

This matter was heard on the 28th day of October, 1986 at New Orleans, Louisiana.

The common issue presented to the Commission by the protesting taxpayers is the alleged inequality of assessment between the First District of Orleans Parish and the remaining six districts. After considering the exhibits filed by the protestors and the arguments and memorandum of the attorneys, the Commission finds that there is an indication that assessments may be unequal between districts. However, the Commission does not find that the weight of the evidence presented establishes inequality of assessment and, therefore, the decision of the Board of Review is upheld.

Although the evidence presented is not conclusive, the Commission will conduct a study as authorized by Louisiana Revised Statutes 47:1837B.

Baton Rouge, Louisiana, this 13th day of November, 1986.

/s/ Carol D. Fisher
CAROL D. FISHER, MEMBER

/s/ Betty J. Lowery
BETTY J. LOWERY, MEMBER

/s/ James W. Smith
JAMES W. SMITH, MEMBER

Louisiana Tax Commission

James W. Adcock, Chairman
Carol D. Fisher, Member
Betty J. Lewery, Member
James W. Smith, Member
Mark H. Bonner, Jr., Member
Ann R. Lavespara, Executive Secretary

Baton Rouge Office
P. O Box 64788
Baton Rouge, La. 70896

May 4, 1987

TO: ALL ASSESSORS

FROM: LOUISIANA TAX COMMISSION

The Tax Commission is ordering a reappraisal of all property for the 1988 tax year, based on Fair Market Value as of 1/1/87.

In previously establishing a valuation date of 1/1/85, for reappraisal in the 1986 tax year (Orleans 1987), the Commission did not anticipate the enormous fluctuations and instability of values caused by the state's economic plight of the last two years. Conversations with assessors and taxpayers, and a composite statewide ratio study, have demonstrated the difficulty of equitably assessing property under the circumstances of 1985-86.

The Commission will provide usual professional and technical assistance of asessors upon request and in accordance with its determination of need as provided by law.

Sincerely,

/s/ James W. Adcock
JAMES W. ADCOCK, CHAIRMAN

/s/ Carol D. Fisher
CAROL D. FISHER, MEMBER

/s/ James W. Smith
JAMES W. SMITH, MEMBER

/s/ Betty J. Lowery
BETTY J. LOWERY, MEMBER

/s/ Mark H. Bonner, Jr.,
MARK H. BONNER, JR.,MEMBER

EXHIBIT 3

APPENDIX C

NO. C-8656
COURT OF APPEAL. FOURTH CIRCUIT
STATE OF LOUISIANA

WESTMINSTER MANAGEMENT CORPORATION, ET AL
VERSUS

PAUL C. MITCHELL, DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS

IN RE:	Westminster Management Corporation, et al
APPLYING FOR:	WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS
DIRECTED TO:	HONORABLE STEVEN R. PLOTKIN, JUDGE, CIVIL DISTRICT COURT, PARISH OF ORLEANS, DIVISION "G", NO. 87-3697 C/W 87-3727, 87-3728, 87-3898

WRIT GRANTED

This matter arises out of the relators' payment, under protest, of $9,676,656.81 in 1987 Real Estate Taxes allegedly due to the City of New Orleans and its various taxing authorities (the Levee Board and the School Board). At issue is the correctness of a trial court ruling releasing some $5,730,654.12 of these funds on the theory that this amount was not "in dispute" as that term is used in R.S. 47:2110 and therefore could not be held in escrow

pending the outcome of a trial on the merits of realtors' claim. We disagree and reverse the trial court's ruling.

R.S. 47:2110 (A), as amended in 1986, provides that:

> No court of this state shall issue any process whatsoever to restrain the collection of an ad valorem tax imposed by the state, or by any political subdivision thereof, under authority granted to it by the legislature or by the constitution. Any person resisting the payment of any amount of tax found due, or the enforcement of any provision of the tax laws in relation thereto, shall pay the amount found due to the officer designated by law for the collection of such tax and shall give the officer notice at the time of payment of his intention to file suit for the recovery of such tax. Upon receipt of such notice, the amount so paid shall be segregated and held by the officer for a period of thirty days. *If suit is filed within such time for the recovery of the tax, then that portion of the taxes paid that are in dispute shall be deemed as paid under protest and such amount shall be segregated and shall be further held pending the outcome of the suit. That portion of the taxes paid by the taxpayer to the officer which is not in dispute shall not be made subject to the protest.* If the taxpayer prevails, the officer shall refund the amount to the taxpayer with interest at the rate of two percent per annum for the period from the date such funds were received by the officer to the date of such refund. If the taxpayer does not prevail, the taxpayer shall be liable for the additional taxes together with interest at the rate of two percent per annum from the date of the notice of intention to file suit for recovery of taxes was given to the officer until the date such taxes are paid. (emphisis added)

Before R.S. 47:2110 was amended, it required that the entire amount of tax assessed be placed in escrow pending resolution of the tax refund suit, even if the petitioner only disputed a portion of the assessed amount. It is clear that the amended version of R.S. 47:2110 was designed to remedy this situation so that, in cases where only a portion of the assessed amount was disputed, the remainder could be released from escrow.

However, the question remains who determines the amount of tax which is "in dispute". Clearly, the answer must be the plaintiff/taxpayer. It is the taxpayer who must file suit to recover taxes alegedly overpaid. The amount of tax "in dispute" is one of the facts the petition must allege. The plaintiff/taxpayer has a right to present evidence in support of his good faith allegations as to how much of his tax bill is disputed and why. The trial court's action in this case denied relators' this fundamental right by, in essence, amending their petition against their will and and reducing the amount of their demand. This denied them the protection which the escrow provisions of R.S. 47:2110 were intended to provide. The City urges, and the trial court apparently agrees, that allowing the plaintiff to fix the amount of tax in dispute frustrates the legislative intent behind the 1986 amendment to R.S. 47:2110. We disagree.

In our opinion, the legislature recognized the plaintiff/taxpayer's fundamental right to set the parameters of his suit by alleging, in good faith, the amount of tax "in dispute". However, the legislature also recognized the potential abuse of this right which could occur if taxpayers exaggerated the disputed amount. Thus, the 1986 amendment to R.S. 47:2110 provided, for the first time, that:

> If the taxpayer does not prevail, the taxpayer shall be liable for the additional taxes *together*

> *with interest at the rate of two percent per annum* from the date of the notice of intention to file suit for recovery of taxes was given to the officer until the date such taxes are paid. (emphasis added)

This provision clearly was intended to deter overstatement by the taxpayer of the amount of tax "in dispute". If a claim is exaggerated and cannot be proven at trial, the taxpayer will pay the price for his exaggeration; a two percent charge. This appears to be the legislature's way of striking a fair balance between the right of the taxpayer/plaintiff to allege the facts as he sees them and the desire to make the undisputed part of tax payments available to taxing authorities. We now examine realtor's petition to determine the scope of its allegations.

A fair reading of this pleading leaves no doubt whatsoever that the *entire* amount of property tax paid in 1987 is being dispursed by realtors not just the difference between their 1986 and 1987 tax bills. The suit challenges the validity of the entire assessment process as applied in the City of New Orleans, on both State and Federal constitutional grounds. The petition also alleges statutory deficiencies in the millage adjustment procedures which taxing authorities are constitutionally required to conduct from time to time.

Given the breadth of realtors' allegations, it is difficult to perceive a factural or legal basis for holding that less then the entire amount of taxes paid are "in dispute".

For the foregoing reasons the ruling of the trial court is reversed.

New Orleans, Louisiana this 2nd day of November, 1987.

/s/ WHB
JUDGE WILLIAM H. BYRNES, III

/s/ DAB
JUDGE DENIS A. BARRY

/s/ JBA
JUDGE JOAN BERNARD ARMSTRONG

NOV 2 1987

APPENDIX D

WESTMINSTER MANAGEMENT CORPORATION, et al.,

v.

Paul C. MITCHELL, Jr., Director of Finance of the City of New Orleans.

PAN-AMERICAN LIFE INSURANCE COMPANY

v.

CITY OF NEW ORLEANS, et al.

PANACON, a Louisiana Partnership

v.

CITY OF NEW ORLEANS, et al.

BEVPAC PROPERTIES

v.

Paul C. MITCHELL, JR., Director of Finance for the City of New Orleans.

No. 88-C-0516.

Court of Appeal of Louisiana,
Fourth Circuit.

May 13, 1988.

Rehearing Denied June 3, 1988.

Real property owners sought recovery of ad valorem taxes paid under protest in action against city finance director, alleging their assessments were unequal and not uniform relative to assessments of similar classes of property in adjacent assessment districts and that assessments in other districts were incorrect because they were too low. Finance director moved for summary judgment arguing procedural exceptions. The Civil District Court, Parish of Orleans, James A. Wysocki, J. ad hoc, denied the summary judgment motion. After grant of certiorari to review the district court judgment, the Court of Appeal, Ciaccio, J., held that: (1) statute providing for direct actions within 30 days after payment under protest of tax due applied only to challenges other than those attacking correctness of assessments, as Constitution mandates review procedures for challenges to correctness of assessments, and (2) property owners' complaint was "correctness" challenge to which constitutionally mandated review procedures applied, and accordingly, property owners' complaints had prescribed when constitutionally mandated review procedures were not timely followed.

Judgment in consolidated cases set aside; peremptory exception of prescription maintained; suits dismissed.

Okla Jones II, City Atty., Jackson P. McNeely, Blaine G. Lecesne, Deputy City Attys., Galen S. Brown, M. Lizabeth Talbott, Robert E. Arceneaux, Barham & Churchill, P.C., New Orleans, for defendant-relator, Paul C. Mitchell, Jr., Director of Finance for the City of New Orleans.

Bertrand F. Artigues, Peggy Wallace, Coleman, Dutrey & Thompson, New Orleans, for plaintiff respondents Bevpac Properties, et al.

Mitchell W. Herzog, Donald A. Meyer, Betty F. Mullin, Shushan, Meyer, Jackson, McPherson & Herzog, New Orleans, for Westminster Management Corp., plaintiff-respondent.

Moise S. Steeg, Jr., Robert M. Steeg, Steeg & O'Connor, New Orleans, for other Westminster plaintiffs and Pan-Am plaintiffs.

Before BYRNES, CIACCIO and WARD, JJ.

CIACCIO, Judge.

In this matter four separate law suits are consolidated. Plaintiffs are owners of real property in the First Assessment District of Orleans Parish. Defendant is Paul C. Mitchell, Jr. in his capacity as Director of Finance for New Orleans. Plaintiffs seek recovery of ad valorem taxes paid under protest.

We granted certiorari to review the district court judgment denying defendant's motion for summary judgment. Although a motion for summary judgment should address the substantive merits of an action, the parties have not addressed the substantive merits of this action, but have argued before the district court and this court procedural exceptions to the plaintiffs' petitions. Looking past the name and form of the pleadings, we consider their content and address the objections raised by the procedural exceptions to plaintiffs' petitions.

We find that plaintiffs failed to file their petitions timely. We hold that plaintiffs' actions have prescribed and that defendant's exception of prescription should be maintained. We, therefore, set aside the judgment of the district court and enter judgment maintaining defendant's excep-

tion of prescription and dismissing plaintiffs' suits.[1]

Plaintiffs sue the City's finance director for relief from a scheme of ad valorem tax assessment which they perceive to be nonuniform and unequal. Plaintiffs clothe their complaint in language challenging the constitutionality of Louisiana Revised Statutes Title 47 as applied to real estate taxation. They base their challenge on a claim that New Orleans is unique within the State's statutory framework for ad valorem taxation: New Orleans, plaintiffs argue, is the State's only political subdivision divided into multiple tax districts. La.R.S. 47:1901.[2]

In Orleans Parish there are seven tax assessors, one from each municipal district. La.R.S. 47:1901. The seven assessors constitute a board of assessors for the parish. La.R.S. 47:1909. Each asessor, however, independently exercises his functions in assessing and listing property in his district. La.R.S. 47:1909.

Plaintiffs complain that their property in the First Assessment District is not assessed on a uniform and equal basis relative to the assessment of property in the other six assessment districts. They claim that their property is assessed properly proportionate to fair market value, but

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[1] Defendant's responsive pleadings are not identical as to each plaintiff. Each plaintiff, however, has responded to defendant's procedural objections, particularly the prescription issue on which we decide this matter. We find that no plaintiff is prejudiced if we consider defendant's exceptions to have been filed as to each plaintiff, and discern no useful purpose in reconstructing here the procedural confusion created in the district court. The district court treated all plaintiffs as one, and the defendant's responses as applying to all; so do we.

[2] La.R.S. 47:1901, as amended in 1970, divides into multiple (at least 3) tax districts parishes geographically divided by the Mississippi River and having a population of over 200,000. That New Orleans may not be unique, however, ultimately is not analytically germane to this case.

that similar classes of property in the other assessment districts are assessed improperly because the assessments are proportionate to valuations which are below fair market value. Plaintiffs argue that this scheme violates La. Const. Art, 7, Sec. 18, which as to assessments (paragraph (A)), use value (paragraph (C)), and valuation (paragraph (D)), requires. The percentage of fair market value shall be uniform throughout the State upon the same class of property." and "Fair market value and use value of property shall be determined in accordance with criteria which shall be established by law and which shall apply uniformly throughout the State."

[1] La. Const. Art. 7, Sec. 18, also establishes the procedure for review of the correctness of assessments:

> (E) Review. The correctness of assessments by the assessor shall be subject to review first by the parish governing authority, then by the Louisiana Tax Commission or its successor, and finally by the courts, all in accordance with procedures established by law.

Plaintiffs and defendant disagree as to which "procedures established by law" apply in this case. Plaintiffs have proceeded under La.R.S. 47:2110 which allows for filing suit within thirty days after payment under protest of the tax due. Defendant argues that in this case plaintiffs must proceed under La.R.S. 47:1998 which allows for filing suit within thirty days of the decision of the tax commission.

To a taxpayer challenging "the correctness of [his] assessment," the availability of judicial review after exhausting the administrative procedures mandated by La. Const. Art. 7, Sec. 18 is provided for in La.R.S. 47:1998. On the other hand, La.R.S. 47:2110 permits a taxpayer to

bring an action directly to the district court if he is challenging "the legality of any tax accrued or accruing or the method of enforcement thereof." Because the Constitution mandates the procedures for "correctness" challenges, La.R.S. 47:2110, to the extent its direct action provisions conflict with the Constitution, must apply only to non-correctness challenges. *Lowery, Chevrolet, Inc., v. Brumley,* 510 So.2d 1294 (La.App. 3d Cir. 1987), writ denied, 514 So.2d 20 (La. 1987); *Capital Drilling Company v. Graves,* 496 So.2d 487 (La.App. 1st Cir. 1986).

[2] Thus, the pivotal issue is whether plaintiffs' challenge is for "correctness." Plaintiffs do not challenge the right of the State or any of its political subdivisions to obtain revenue by way of ad valorem taxation. Plaintiffs do not question the methods of enforcement of ad valorem taxes. Plaintiffs complain that their assessments are unequal and not uniform relative to assessments of similar classes of property in adjacent assessment districts. Plaintiffs' complaint is a "correctness" challenge.

[3] Plaintiffs argue that they are not challenging correctness—their assessments are correct, other assessments are incorrect, too low. Plaintiffs argue that their challenge is of constitutional magnitude resulting from inequality and non-uniformity, invoking the due process and equal protection clauses of the state and federal constitutions. We make no argument with plaintiffs' foundational principle that "if both the standard of true value and the uniformity and equality required by law cannot be achieved, equality and uniformity is preferred under the law." *Sioux City Bridge Company v. Dakota County, Neb.,* 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Probst v. City of New Orleans,* 337 So.2d 1081 (La.1976); *Bussie v. Long,* 286 So.2d 689 (La.App. 1st Cir.1973), writ denied, 288 So.2d 354 (La.1974). We find, however that plaintiffs

incorrectly construe this and other "constitutional" principles to argue that their challenge is not for "correctness." "Correctness" includes both the standard of true value and the uniformity and equality required by law. The achievement of both is the goal, the absence of either creates incorrectness. That uniformity and equality are given higher priority than true value does not make an attack on the former rather than the latter something other than a challenge for "correctness."

We do not find significant distinction between this case and *Lowrey Chevrolet, Inc. v. Brumley,* above. Lowrey Chevrolet paid its taxes under protest, and under La.R.S. 47:2110 brought suit challenging the non-uniformity and inequality of the assessment on its inventory relative to assessments on similar classes of property in other tax districts (parishes) in the State. The court found that Lowrey Chevrolet's challenge was for "correctness", and that Lowrey Chevrolet was obligated to proceed under the administrative procedures mandated by La. Const. Art. 7, Sec. 18, and the procedure for judicial review provided in La.R.S. 47:1998. Plaintiffs argue that comparing assessment districts within Orleans Parish is different than comparing tax districts within the State because the millage rate within Orleans Parish is necessarily constant whereas the millage rates between other State tax districts may be, and most often are different. This distinction is not significant because the applicable millage rate is immaterial to a discussion of the correctness of the assessment; and what plaintiffs are challenging is the correctness of their assessments relative to assessments of similar classes of property in adjacent assessment districts, regardless of the applicable millage rate.

Having found that plaintiffs challenge the correctness of their assessments, we also conclude that they are

obliged to follow the procedures mandated by La. Const. Art. 7 Sec. 18 and provided for in La.R.S. 47:1998. That is, the correctness of assessments by the assessor must be reviewed first by the parish governing authority, then by the Louisiana Tax Commission or its successor, and finally by the courts, all in accordance with the procedures established by law for judicial review is in La.R.S. 47:1998, which requires filing suit within thirty days of the decision of the tax commission.

Some plaintiffs did not seek administrative review, and the time for doing so has past. The other plaintiffs obtained review first by the parish governing authority and then by the Louisiana Tax Commission, but did not file suit within thirty days of the decision of the tax commission. The time for seeking administrative review or judicial review had past as to all plaintiffs prior to the filing of the petition in any of these four consolidated cases.[3]

We hold, therefore, that plaintiffs' suits have prescribed and should be dismissed. We set aside the judgment of the district court and enter judgment maintaining an exception of prescription. Plaintiffs' suits are dismissed. "Plaintiffs shall pay all costs of these proceedings.

JUDGMENT SET ASIDE, PEREMPTORY EXCEPTION OF PRESCRIPTION MAINTAINED: SUITS DISMISSED.

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3. Whether the elapsed time periods involved here are peremptive or prescriptive need not be resolved in this case, either objection can be raised by the peremptory exception of prescription. *Capital Drilling Co. v. Graves*, 496 So.2d at 490.

ON PLAINTIFFS' APPLICATION FOR REHEARING

Plaintiffs correctly point out that the 1970 amendment to La.R.S. 47:1901, see La.Acts 1970 No. 155, Section 1, referred to in footnote 2 of our original opinion, was declared unconstitutional in *Chehardy v. Democratic Executive Committee for the Parish of Jefferson,* 259 La. 45, 249 So.2d 196 (1971). Plaintiffs do not argue that this point affects the substance or result of the opinion, for it does not. The illustrative purpose of the notation remains, as does its substantive comment that any uniqueness of multiple assessors for Orleans Parish is not important to resolution of the issues raised in this appeal.

With this comment of clarification, we deny the application for rehearing.

APPENDIX E

THE SUPREME COURT OF THE STATE OF LOUISIANA

WESTMINISTER MANAGEMENT CORPORATION, et al
VERSUS
PAUL C. MITCHELL, JR., DIRECTOR OF
FINANCE OF THE CITY OF NEW ORLEANS

C/W

PAN-AMERICAN LIFE INSURANCE COMPANY
VERSUS
CITY OF NEW ORLEANS, et al

C/W

PANACON, A LOUISIANA PARTNERSHIP

VS. NO. 88-CC- 1713

CITY OF NEW ORLEANS, et al

C/W

BEVPAC PROPERTIES
VERSUS
PAUL C. MITCHELL, JR., DIRECTOR OF
FINANCE FOR THE CITY OF NEW ORLEANS

- - - - - -

IN RE: Westminster Management; LePavillon Hotel; Bilbe, Jerry C.; Bellarie, Sheila B.; Bilbe, Kathleen M.; Bilbe, Mary D.; Stedman Management Co. Inc.; Regent York Inc.; New Orleans Diamond/Jew.Whole.; Turngemeinde Prtn. in Commendam; Hartwig Moss Ins. Agency Ltd.; W. R. Zanes & Co./LA Inc.; Zanes, W. R. & Co./LA

Inc.; Bernos Investment Corp.; Six-O-One Julia Corp.; 601 Julia Corp.; T. D. Bickham Corp.; Bickham, T.D. Corp.; Aitkens Realty Co. Inc.; Lupo, Thomas J. Enterprises; Thomas J. Lupo Enterprises; New Orleans Rivercenter; International Rivercenter; Garon and Brener; Lovell, John C. Jr.; Kronlage, Charles A. Jr.; J. A. Hoerner Co. Inc.; Hoerner, J. A. Co. Inc.; Ber. James M.; Delta Theatres Inc.; Church, Thomas D.; National Meat and Provision Co; Green, A. T. Jr.; Odeco Bldg. Corp.; 210 Baronne St. Limited Prtn.; Lincoln Property Co. C.S. E. Inc.; Canarles Realty Corp.; Huger, Killian L. Jr.; Dixie Art Supplies Inc.; Place St. Charles/LA Prtn.; Grand Lodge/State of LA; Canizaro, Joseph C. Interests; Cliff Probst Inc.; Probst, Cliff Inc.; Watkins, Eben T.; FNBC Trustee; Pan-American Life Ins. Co.; Applying for Writ of Certiorari and/or Review, Prohibition, Mandamus, Supervisory and/or Remedial Writs; to the Court of Appeal, Fourth Circuit, Number 88-CW-0516; Parish of Orleans Civil District Court Div. "G" Number 87-3697, 87-3727, 87-3728, 87-3898

- - - - - -

October 14, 1988

Denied.

JCW
JAD
JLD
HTL — CALOGERO, J., would grant the writ.
LFC — MARCUS, J., recused.

Supreme Court of Louisiana
October 14, 1988

/s/ Frans J. Labranche, Jr.

Clerk of Court
For the Court

APPENDIX F

LOWREY CHEVROLET, INC.,
Plaintiff-Appellant,

v.

James A. BRUMLEY, Jr., in his Capacity as Sheriff and Ex Officio Tax Collector for Sabine Parish, Louisiana, Defendant-Appellee.

No. 85-1045.

Court of Appeal of Louisiana,
Third Circuit.

June 26, 1987.

Taxpayer brought suit seeking return of ad valorem taxes paid under protest. The Eleventh Judicial District Court, Parish of Sabine, John S. Pickett, Jr., J., sustained exceptions of prematurity, prescription and no cause of action, and taxpayer appealed. The Court of Appeal, Domengeaux, J., held that taxpayer's suit challenged correctness of its assessment and thus taxpayer was obligated to seek administrative review prior to requesting judicial relief.

Affirmed.

Neil Erwin, Shreveport, for plaintiff-appellant.

James L. Davis, Many, Thomas S. Halligan, Robert H. Abbott, III, Baton Rouge, Kenneth N. Simmons, Many, for defendant-appellee.

Before DOMENGEAUX, LABORDE and YELVERTON, JJ.

DOMENGEAUX, Judge.

This opinion will address the issues presented for review in the cases entitled: *Lowrey Chevrolet, Inc. v. James A. Brumley, Jr., in his capacity as Sheriff and Ex Officio Tax Collector for Sabine Parish, Louisiana,* and *Lowrey Chevrolet, Inc. v. Dean Lambert, in his capacity as Chief of Police and Ex Officio Tax Collector for the Town of Many, Louisiana, and the Town of Many, Louisiana,* numbered by our Clerk 85-1045 and 85-1046, respectively. The trial court, although these cases were consolidated prior to trial, chose to render separate judgments. We will, for the reasons hereinafter set forth, decide all issues in this opinion but, for the purposes of convenience and consistency will render a separate decree in the matter entitled: *Lowrey Chevrolet, Inc. v. Dean Lambert, in his capacity as Chief of Police and Ex Officio Tax Collector for the Town of Many, Louisiana, and the Town of Many, Louisiana,* numbered, 85-1046, 510 So.2d 1299.

Lowrey Chevrolet, Inc. (Lowrey Chevrolet), an automobile and truck dealership in the Town of Many, in Sabaine Parish, Louisiana, brought suit against the Sheriff and Ex Officio Tax Collector of Sabine Parish, James A. Brumley, Jr. (Brumley). Lowrey Chevrolet sought from Brumley the return of $45,441.44 in ad valorem taxes paid under protest for the year 1984, together with interest at the rate of two percent per annum, pursuant to La.R.S. 47:2110.

Lowrey Chevrolet, in a companion case consolidated with the *Brumley* suit, brought suit against the Chief of Police and Ex-Officio Tax Collector for the Town of Many,

Dean Lambert, and the Town of Many, Louisiana, (both hereinafter referred to as Lambert). The plaintiff's suit against Lambert sought the return of $3,534.40 in ad valorem taxes paid under protest for the year 1984, together with interest at the rate of two percent per annum.

Lowery Chevrolet, additionally, sought in both the *Brumley* and *Lambert* suits, judgments relieving it of the obligation of paying future ad valorem taxes. The plaintiff challenged the collection of the ad valorem taxes alleging that the assessment of similar classes of property throughout the state did not comply with La.Const. art. VII § 18. Article VII § 18 requires that similar classes of property, in this case new and used automobiles and trucks, be uniformly valued. Lowery Chevrolet reasoned that because its inventory was valued higher than the inventory of other automobile and truck dealerships in Louisiana it was paying proportionately higher ad valorem taxes.

Brumley answered Lowrey Chevrolet's petition and in the same pleading filed a third-party demand. Brumley's answer denied liability stating that as sheriff and ex officio tax collector he was not responsible for assessing property or fixing millage rates. Brumley's third-party demand named the Sabine Parish Tax Assessor, Conrad Cathey, and the Louisiana Tax Commission as third-party defendants. The third-party plaintiff's demand alleged that Cathey and the Louisiana Tax Commission were the proper parties to respond to the plaintiff's suit.

Cathey, without answering the third-party demand, excepted to the right of the third-party plaintiff, Brumley, to proceed. The assessor sought to have Brumley's third-party demand dismissed on the grounds that it failed to state a cause of action and was vague.

The Louisiana Tax Commission excepted to the right of the plaintiff to proceed and, in the same filing, excepted to the third-party demand of Brumley. The Commission argued that since the third-party demand was interrelated with the main demand it was susceptible to the same exceptions as the main demand. The Commission challenged the right of Lowrey Chevrolet and Brumley to proceed on the grounds that: (1) the district court lacked jurisdiction over the subject matter; (2) the main demand and the third-party demand were premature; (3) the main demand and the third-party demand were prescribed and, for the same reasons, were perempted; and (4) neither the main demand nor the third-party demand stated a cause of action.

Lambert, in the companion case and without answering, also excepted to the action of Lowrey Chevrolet. Lambert sought the dismissal of the plaintiff's petition on the grounds that: (1) the plaintiff had failed to join an indispensable and/or necessary party; and (2) the plaintiff's petition failed to state a cause of action.

The Louisiana Attorney General, although not named as a defendant, in either the *Brumley* or *Lambert* suits, was served in both pursuant to La.Code Civ.Proc. art. 1880. Article 1880 provides that when a "statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall be served with a copy of the proceeding and be entitled to be heard."

The Attorney General, subsequent to being served, excepted to the right of the plaintiff to proceed in both cases. The Attorney General's exceptions in both *Brumley* and *Lambert* were identical to those filed by the Louisiana Tax Commission. The Attorney General sought to have both suits dismissed on the grounds that: (1) the district court lacked jurisdiction over the subject matter; (2) both

suits had been filed prematurely; (3) both actions had prescribed and, for the same reasons, were perempted; and (4) neither petition stated a cause of action.

The trial court in *Brumley* sustained the Attorney General and Louisiana Tax Commission's exceptions of prematurity, prescription and no cause of action. The trial court also sustained the exception of no cause of action filed by the Sabine Parish Tax Assessor, Cathey. Lowrey Chevrolet's suit was thereafter dismissed at its costs and the remaining exceptions were declared moot.

The trial court in *Lambert* sustained the Attorney General's exception of lack of jurisdiction over the subject matter and also sustained the exceptions of prematurity, prescription and no cause of action filed by the Attorney General, the Chief of Police and Ex Officio Tax Collector of the Town of Many, Dean Lambert, and the Town of Many. The court then dismissed the plaintiff's suit at the plaintiff's cost.

The trial court, in agreement with the arguments presented by the Attorney General and the Louisiana Tax Commission, adopted the memoranda of authority submitted by both parties as its reasons for judgment. The conclusions in the memoranda rest entirely upon La. Const. art. VII § 18(E). Article VII § 18(E) provides.

> Review. The correctness of assessments by the assessor shall be subject to review first by the parish governing authority, then by the Louisiana Tax Commission or its successor, and finally by the courts, all in accordance with procedures established by law.

The memoranda argue that Lowrey Chevrolet's peti-

tions were premature because the plaintiff did not comply with the dictates of Article VII § 18(E). the authors of the memoranda interpret the Constitution to require that taxpayers questioning the correctness of their assessments exhaust all administrative remedies prior to seeking judicial relief. The memoranda conclude that because the plaintiff did not seek a review of its assessment, at the local and then at the state level, it was not yet entitled to judicial review.

The memoranda, in addressing the appropriateness of sustaining the exceptions of prescription, conclude that because Lowrey Chevrolet failed to comply with Article VII § 18(E) and its implementing legislation, La.R.S. 47:1931, 1932, 1989 and 1998, within the time periods announced in the statute the plaintiff's right to seek administrative review had expired. A review of Title 47 Sections 1931, 1992, 1989 and 1998, reveals that when the plaintiff filed its suits, the opportunity to seek administrative review had passed.

The memoranda also relied upon Article Vii § 18(E) in supporting the exceptions of no cause of action. The Attorney General and the Louisiana Tax Commission both concluded that essential to Lowrey Chevrolet's causes of action was the unsatisfactory exhaustion of administrative relief. Since Lowrey Chevrolet failed to seek administrative relief, or at least failed to allege the exhaustion of administrative relief, the memoranda conclude, it failed to state a cause of action.

Lastly, and with reference only to the *Lambert,* suit, the Attorney General argued in his memorandum that the district court lacked jurisdiction over the subject matter because the plaintiff failed to seek administrative relief prior to petitioning the court. The Attorney General took

the position that the Constitution mandates that taxpayers challenging the correctness of their assessment first attempt to secure administrative relief and then proceed to the courts. The memorandum concludes that because the administrative requirements of Article VII § 18(E) were not complied with prior to suit the district court was without authority to hear the case.

Lowrey Chevrolet brought this appeal raising three assignments of error: (1) the trial court erred in dismissing Lowrey Chevrolet's suits for failing to comply with La. Const. art. VII § 18(E) and the administrative provisions which implement the Constitution; (2) the trial court erred in permitting the Louisiana Attorney General to participate in the suits as a party, particularly sanctioning the right of the Attorney General to except to the plaintiff's petitions; and (3) the trial court erred in sustaining an exception of no cause of action filed by Lambert on the grounds that neither Lambert nor the Town of Many were necessary parties.

The district court sustained the exceptions filed against Lowrey Chevrolet concluding that the administrative procedures mandated by Article VII § 18(E) had not been followed. Lowrey Chevrolet contends that it was not obligated to comply with the administrative review requirements because it was not proceeding under Article VII § 18, but rather, was seeking relief pursuant to La.R.S. 47:2110. Lowrey Chevrolet ultimately argues that it was not obligated to comply with Article VII § 18 because it was not challenging the correctness of its assessment and because R.S. 47:2110(D) provides the means for a direct appeal to the district court. We disagree.

[1] Article VII § 18 mandates that certain administrative procedures be followed when a taxpayer ques-

tions the "correctness of [his] assessment." R.S. 47:2110 provides, on the other hand, that a taxpayer may bring an action directly to the district court if he is challenging the "legality of any tax accrued or accruing or the method of enforcement thereof." The question is, therefore, was Lowrey Chevrolet challenging the correctness of its assessment or the legality or method of enforcement of ad valorem taxes.

We believe that the plaintiff's suits sought to correct an incorrect assessment Lowrey Chevrolet was not challenging the right to the State to obtain revenue by way of ad valorem taxation, nor was the plaintiff questioning the methods by which ad valorem taxes are enforced. We, therefore, conclude that pursuant to Article VII § 18(E) Lowrey Chevrolet was obligated to seek administrative review prior to requesting judical relief.

[2] Lowrey Chevrolet also argues that R.S. 47:2110(D) provides taxpayers contesting the correctness of their assessments with the means of directly appealing their assignments to district court. R.S. 47:2110(D) provides,

> The right of action provided in this section shall be in addition to any rights elsewhere provided in this Sub-title, including R.S. 47:1998, affording taxpayers an opportunity to test the legality or *correctness of their assessments* or ad valoreum taxes paid under protest before the courts of state. (Emphisis added).

The "right of action" referenced above is the right to challenge an assessment directly in district court.

Absent from the appellant's argument, however, is the fact that R.S. 47:2110(D) was enacted in 1970 and is, to the extent relevant to this case, in conflict with Article VII § 18(E) of our constitution of 1974. Pursuant to the express language of La. Const. art. XIV § 18(B), laws which were in conflict with the Constitution on its effective date are demed to have been superceded. R.S. 47:2110(D), to the extent it grants taxpayers questioning the correctness of their asssessments the right of appealing their assessments directly to district court, is in conflict with Article VII § 18(E) and has, therefore, been superceded.

Lowrey Chevroley further suggests that *Rickey Tri-Key Partnership v. Supleix,* 462 So.2d 235 (La.App. 3rd Cir. 1984), *writ denied,* 464 SO.2d 1384 (La.1985) supports its right of direct appeal. Subsequent to a review of the facts and issues in both *Rickey* and the instant case, we must reject the appellant's argument.

Lowrey Chevroley contends that the following language in *Rickey,* albeit dictum, supports its position,

> La.R.S. 47:2110(A) provides a direct legal action against the collecting entity with no appearances before administrative boards or agencies.... [This] same statute, in section 2110(D), clearly provides that the direct action afforded in subsection (A) is in addition to the administrative remedies afforded elsewhere in title 47. *Id.* at 237.

Although the referenced statement does lend support to the appellant's argument, we must decline to follow it because of the dissimilarity between *Rickey* and the instant case.

In *Rickey,* the taxpayer sought to challenge the correctness of its assessment by appealing that assessment

first to the local governing authority and then to the Louisiana Tax Commission. The taxpayer only brought suit in district court subsequent to the unsatisfactory exhaustion of its administrative remedies.

The appellee in *Rickey*, upon the taxpayer's appeal to the district court, filed a peremptory exception of prescription against Rickey contending that Rickey had failed to bring suit within thirty days of paying its taxes under protest, as required by R.S. 47:2110. Factually, the appellee was correct. During Rickey's appeal before the Louisiana Tax Commission its tax obligation became due. Rickey, in compliance with the law, paid its taxes but, paid them under protest. Rickey's suit, although filed within thirty days of the tax commission's decision, was not brought within thirty days of paying its taxes.

The district court dismissed Rickey's suit concluding that the taxpayer had lost the right to appeal its assessment to the district court because it had not brought suit within thirty days of paying its taxes under protest. On appeal we reversed concluding that Rickey had properly complied with the administrative review procedures and that its suit was timely pursuant to R.S. 47:1998. R.S. 47:1998(A), as stated in *Rickey*, "expressly [grave] the appellant the right to contest an adverse decision of the tax commission in the district court within thirtydays of that decision." *Rickey supra* at 236.

In the instant case Lowrey Chevrolet proceeded directly to district court, bypassing administrative review, and the issue which now confronts us, unlike *Rickey*, is one of constitutional magnitude. Reiterating our earlier conclusion, we must decline to follow the dictum in *Rickey* because the cases are factually distinguishable and because we were not called upon in *Rickey* to resolve the constitu-

tional question which now appears before the bar of our Court.

Lowrey Chevrolet's second assignment of error questions the propriety of the district court ruling sustaining the exceptions filed by the Louisiana Attorney General. Lowrey Chevrolet contends that Code Civ. Proc. art. 1880 does not grant the Attorney General the right to intervene on behalf of the State as a party in its lawsuits. Article 1880 provides, in part.

> If a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled *to be heard.* (Emphasis added).

Although we disagree with the contention of the plaintiff, because we have previously affirmed the dismissal of Lowrey Chevrolet's petitions based upon exceptions filed by other parties, we need not address this assignment of error.

Having previously concluded that the trial court correctly dismissed the plaintiff's suits we need not address its final assignment of error questioning. as interpreted by the plaintiff, the trial court's decision to dismiss Lambert and the Town of Many on an exception of no cause of action because they were not necessary parties. We must, however, state that our review of the record does not reveal that the exception of no cause of action was sustained on the grounds alleged by the plaintiff. Our review of the judgment and memorandum of authority, adopted by the court as its reasons, indicates that the exception of no cause of action was sustained because administrative review, a prerequiste to judicial review, was not sought.

For the above and foregoing reasons the judgment of the district court in favor of James A. Brumley, Jr., in his capacity as Sheriff and Ex Officio Tax Collector for Sabine Parish, Louisiana, the defendant-appellee, is affirmed.

All costs of this appeal are assessed against Lowrey Chevrolet, Inc., the plaintiff-appellant.

AFFIRMED.

A-63

LOWREY CHEVROLET, INC.,
Plaintiff-Appellant,

v.

Dean LAMBERT, in his Capacity as Chief of Police and Ex Officio Tax Collector for the Town of Many, Louisiana, and the Town of Many, Louisiana, Defendants-Appellees.

No. 85-1046

Court of Appeal of Louisiana,
Third Circuit.

June 26, 1987.

Appeal from 11th Judicial DIstrict Court, Parish of Sabine; John S. Pickett, Jr., Judge.

Neil Erwin, Shreveport, for plaintiff-appellant.

James L. Davis, Kenneth N. Simmons, Many, Thomas S. Halligan, Robert H. Abbott, Baton Rouge, for defendants-appellees.

Before DOMENGEAUX, LABORDE and YELVERTON, JJ.

DOMENGEAUX, Judge.

For the reasons set forth in the matter entitled *Lowrey Chevrolet, Inc., v. James A. Brumley, Jr., in his capacity as Sheriff and Ex Officio Tax Collector for Sabine Parish, Louisiana,* 510 So.2d 1294, numbered 85-1045, in which a separate decision is being rendered this day, the

judgment of the district court in favor of Dean Lambert, in his capacity as Chief of Police and Ex Officio Tax Collector for the Town of Many, Louisiana, and the Town of Many, Louisiana, the defendant-appellees, is affirmed.

All costs of this appeal are assessed against Lowrey Chevrolet, Inc., the plaintiff-appellant.

AFFIRMED.

(3)

Supreme Court, U.S.
FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1102

In the
Supreme Court of the United States
OCTOBER TERM, 1988

WESTMINSTER MANAGEMENT CORPORATION, ET ALS.

Petitioners

v.

PAUL C. MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS, AND ATTORNEY GENERAL WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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NO: 88-1102

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WESTMINSTER MANAGEMENT CORPORATION, ET ALS.

Petitioners

v.

PAUL C. MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS, AND ATTORNEY GENERAL WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA

Respondents

RESPONDENT'S OPPOSITION

Respondent, Paul C. Mitchell, in his official capacity as Finance Director of the City of New Orleans, respectfully submits this brief in opposition to the petition for certiorari filed herein by Petitioners, Westminster Management

Corporation, et als. For the reasons offered below, Respondent submits that the requested writ of certiorari is not warranted, considering in the first instance that Petitioners' complaint of denial of due process of law was not timely raised below, nor passed upon by any Louisiana court. Accordingly, this Court is without jurisdiction to now consider such a claim. Further, Respondent submits that the court of appeal correctly denied Petitioners' relief below due to their failure to exhaust the administrative remedies required by law and that the dismissal on that ground constitutes an adequate and independent state procedural ground, such that review by this Court is precluded.

COUNTERSTATEMENT OF THE CASE

The questions as presented by Petitioners bear little relationship to the proceeding as constituted below.

Comparison of the federal question raised below, in contrast with that asserted here, is essential to an understanding of what federal rights are, and are not, at issue here, as well as what federal rights were, and were not, at issue in the court below.[1]

The Federal Question Presented Below

The Petitioners asserted below that their ad valorem property taxes for the year 1987 correctly reflected the true value of their property, but that the property of other taxpayers of the same class were incorrectly underassessed. If established, this claim gives rise to but one constitutional question: whether the alleged underassessment of other similarly

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[1]Clarification is also needed as to who is, and who is not, a Respondent. William J. Guste, Attorney General for the State of Louisiana is so named on the face of the Petition. He is not now, nor has he ever been, a party to this proceeding.

situated property owners constitutes a denial of equal protection of the laws in violation of the Louisiana and federal constitutions.

> The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441, 445-447, 43 S.Ct. 190, 191, 192, 67 L.Ed. 340, 28 A.L.R. 979; *Iowa-Des Moines Nat'l Bank v. Bennett,* 284 U.S. 239, 247, 52 S.Ct. 133, 136, 76 L.Ed. 265; *Cumberland Coal Co. v. Board of Revision,* 284 U.S. 23, 29, 52 S.Ct. 48, 50, 76 L.Ed 146.

Hillsborough Township v. Cromwell, 326 U.S. 620, 623 (1946).

In furtherance of those principles, this Court has long held that "if both the standard of true value and the uniformity required by the law cannot be achieved, equality and uniformity is preferred under the law." *Sioux City, supra.* A taxpayer under such circumstances must have available to him the remedy of reduction in his taxes, or the right to uniformity and equality guaranteed to him by the federal constitution will be deemed to have been violated.

In instances in which it was apparent that the state procedure or judiciary did not provide the remedy of reduction of taxes, but rather relegated the taxpayer solely to an action to increase the assessments of other taxpayers more favorably treated, this Court has not

hesitated to intervene to require the states to grant the taxpayer the constitutionally required remedy of reduction in order to assure "equality and uniformity . . . under the law." *Sioux City, supra; Hillsborough, supra.*

No Equal Protection Claim Is Asserted Here

However, this is not a case in which the litigants seek this Court's intervention to secure that relief. Petitioners freely acknowledge that Louisiana courts recognize this federally guaranteed remedy:

> Following the guidelines of *Yick Wo, Sunday Lake,* and *Sioux City,* Louisiana jurisprudence . . . has applied this concept in the context of determining the validity of ad valorem taxation. *Dixon v. Flournoy,* 176 So.2d 138 (La. 1965) citing *Soux City, et als,* in footnote p. 140); *Bussie v. Long,* 286 So.2d 689 (La. App. 1st Cir. 1974); *Probst v. City of New Orleans,* 325 So.2d 665 (4th Cir. La. 1976).

Petition, p. 12. Petitioners then quote the opinion below for that proposition:

> The following is language of the court below recognizing the Louisiana position:
>
> We make no argument with plaintiffs' foundational principle that "if both the standard of true value and the uniformity and equality required by law cannot be achieved, equality and uniformity is preferred under the law." *Sioux City Bridge Company v. Dakota County, Neb.*, 260 U. S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Probst v. City of New Orleans*, 337 So.2d 1081 (La. 1976); *Bussie v. Long*, 286 So.2d 689 (La. App. 1st Cir. 1973), writ denied, 288 So.2d 354 (La. 1974).
>
> *Westminster Management Corp. v. Mitchell*, 525 So.2d 1171, 1173 (La. App. 4th Cir. 1988).

Petition, p. 12.

In fact, earlier decisions in this very case reveal that the state stood ready to apply the federal remedy of reduction. In the course of its observation that Petitioners were not permitted to place their entire tax liability at issue (and thus that some of the funds escrowed were "not

in dispute" and had to be released), the trial court observed:

> [I]t is more likely than not that if the taxpayers prevail, their ad valorem tax liability for 1987 will not be less than . . . the amount of their 1986 ad valorem taxes.
>
> The City of New Orleans is not insolvent. **Should the taxpayers secure a judgment higher than their cumulative 1986 taxes, the City has the present and future ability to satisfy the judgment.**

Trial court decision in escrow dispute; Respondent's Appendix B-10,11 (emphasis supplied). The Fourth Circuit Court of Appeals reversed[2], but the Louisiana Supreme Court granted Writs and reinstated the trial court judgment "for

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[2]Incredibly, Petitioners have reproduced the Fourth Circuit opinion in the escrow dispute in full, and quote it at length. Petitioners then have the audacity to criticize the later Fourth Circuit decision for "[i]gnoring its opinion in the first Westminster case . . ." Pet. p. 17. In view of the fact the Supreme Court of Louisiana "reversed and vacated" that opinion, the Fourth Circuit would have been derelict had it followed it.

the reasons assigned by the district judge."

Plainly no Louisiana court would impose upon Petitioners the impermissible burden of forcing the assessments of other taxpayers to be increased. Rather, as the court's reference to a monetary judgment makes clear, Louisiana will apply the federal remedy in cases that properly assert it.

Petitioners are therefore correct that this case is "[u]nlike the West Virginia cases," recently decided by this Court. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County* (Docket No. 87-1303) c/w *East Kentucky Energy Corp. v. County Commissioner of Webster County* (Docket No. 87-1310, 57 L.W. 4095, _____ U.S. _____ (Jan. 18, 1989). (In *Allegheny* this Court reversed a state court decision which relegated taxpayers to the remedy of having other taxpayers' assessments

increased.) By Petitioners' own admission, the courts of Louisiana will enforce the federally required remedy of reduction in taxes where it is made to appear that "both the standard of true value and the uniformity and equality required by the law cannot be achieved." This was the only federal question presented by the pleadings below. Petitioners have here acknowledged, and indeed cannot dispute, that the federal remedy was available to them.

The State Court Action

Although the federal remedy of reduction was available to these taxpayers, the appellate court did not reach the federal question. The suits were dismissed based on the taxpayers' failure to follow the procedures mandated by Article VII, Section 18(E) of the Louisiana Constitution of 1974, as implemented by La. R.S.

47:1989 - 1998, requiring exhaustion of administrative remedies and timely institution of a suit for judicial review thereafter.

The federal question that logically flows from the holding below is whether the Louisiana court of appeal's[3] dismissal for failure to timely comply with required Louisiana procedures constitutes an "adequate and independent state" ground, such that the court was justified in not reaching the federal question of equal protection. *Michigan v. Tyler,* 436 U.S. 499, 512 n7 (1978); *New York Times v. Sullivan,* 376 U.S. 254, 264 n4 (1964).

Generally, "[a] taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct

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[3]*Westminster Management Corp. v. Mitchell,* 525 So.2d 1171 (La. App. 4th Cir. 1988), *writ denied* 532 So.2d 132 (La. 1988).

assessment of a tax cannot thereafter be heard by a judicial tribunal to assert its invalidity."[4] When state courts decline to reach a federal question for this reason, this Court will ordinarily decline jurisdiction for lack of a federal question. *See Gorham, supra* and cases cited therein; *McCoy v. Shaw,* 277 U.S. 302 (1928). In apparent recognition of this obstacle to invocation of this Court's jurisdiction, Petitioners here discard the mantel of equal protection in favor of a cloak of due process.

The Federal Question Here

It is difficult to respond to the questions as presented, due to the fact that Petitioners apply standards that have little bearing on the issue of whether this

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[4]*Gorham Manufacturing Co. v. State Tax Commission of New York,* 266 U.S. 265, 269, 270 (1924)

Court has jurisdiction to accept this case for review.[5] The difficulty is compounded by Petitioners' omissions and misstatements of the Louisiana law advanced in support of their argument.

It appears, however, that the gravamen of their complaint before this Court is that the dismissal of the petitions below based on Petitioners' failure to comply with state procedures required as a condition precedent to assert their challenge, denied them due process of law. If Respondent understands the argument, it

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[5]For example, at page 10, Petitioners query whether the Louisiana court has "met the constitutional mandate to provide a 'plain, adequate and complete' remedy to its taxpayers." No citation of authority is provided for the suggestion that there is such a constitutional mandate. Indeed, Petitioners appear to have lifted that language, at least partially, from 28 USC § 1341 which restrains federal district courts from interfering with the "assessment of . . . any tax under State law where a plain, speedy and efficient remedy" is had in the courts of the state.

is that their lawsuits should not have been dismissed on that ground, because Petitioners did not know that the procedural rule was applicable to them. This is but the thinnest of reeds, for a long line of Louisiana jurisprudence has required timely exhaustion of administrative remedies in instances in which a taxpayer challenges the "correctness" and legality of his assessment.

Assuming this characterization of Petitioners' argument is correct, two questions are presented. First, can Petitioners be excused from their failure to timely raise the due process question in either the trial or appellate court? And second, on the facts and law presented, can Petitioners actually demonstrate that their due process rights were affected? Both questions must be answered in the

negative. The petition is due to be dismissed for lack of jurisdiction.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. THIS COURT HAS NO JURISDICTION BECAUSE THE QUESTION WAS NOT TIMELY RAISED BELOW.

Petitioners assert that this Court's jurisdiction is premised on 28 USC § 1257(3), presumably on the ground that a "title, right, privilege or immunity is specially set up or claimed under the Constitution of . . . the United States." However, neither Respondent nor this Court should be required to guess at the jurisdictional provision, for the law is well settled that the Petitioner bears the burden of affirmatively establishing this Court's jurisdiction. *See e.g., Street v. State of New York,* 394 U.S. 576 (1969). Petitioners have not met this burden.

The Petition Does Not Allege Any Facts In Support of This Court's Jurisdiction

Pursuant to Supreme Court Rule 21(h) Petitioners were required to ". . . specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised . . .," including "the method or manner of raising them and the way in which they were passed upon by the court. . . with specific reference to the places in the record where the matter appears . . ." These specifics are all required to "show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

The Petition before this Court contains no such specific jurisdictional allegations; indeed it contains no general ones. As one familiar with the record, Respondent suggests that their absence is due to Petitioners' inability to establish them. The Petition is therefore facially defective with respect to this Court's jurisdiction and is due to be dismissed on that ground alone.

The Issue Was Not Raised At Petitioners' First Opportunity

"It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state." *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 86 n.9. (1980). The only exception to this rule is "in circumstances in which the litigant could not "reasonably . . .

anticipate" that a state court decision would adversely affect constitutionally guaranteed rights, or if the state court has rendered an "unexpected interpretation of state law" or has "reversed its prior interpretation." *See e.g. Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 677-678 (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 313, 320 (1930); *Saunders v. Shaw,* 244 U.S. 317, 320 (1917).

Under such circumstances, a litigant's failure to raise the federal question may be excused if he invokes "the protection of the Federal Constitution . . . " at his "first opportunity" to do so. *Pruneyard Shopping Center, supra.* The record below reveals that Petitioners missed many opportunities to raise the due process

issue presented here.[6] Accordingly, it comes too late for this Court to have jurisdiction to consider it.

The pleadings filed by Respondent in both the trial and appellate court urged that the petitions should be dismissed for the reason that the remedy set forth in La. R.S. 47:1998 was exclusive. Thus Petitioners were fully aware of the consequence - i.e., dismissal - that would ensue in the event a court were to apply the law as urged by Respondent. But the alleged deprivation of due process about which Petitioners now complain is precisely that their petitions were

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[6]The petitioners below claimed that their *tax assessments* violated both due process and equal protection. Actually, however, it is clear from their pleadings that the claim below did not involve due process, but only equal protection. In any event, that clearly is not the "due process" denial that Petitioners bring to this Court; here their complaint is not with the tax assessment, but with their opportunity to be heard in connection with that assessment.

dismissed. The due process question was thus staring Petitioners in the face, yet they did not present it to either the trial or the appellate court.

Even if for some reason, the Petitioners could convince the Court that they could not have "reasonably anticipated" that construction at the trial court level, so as to excuse their failure to raise it there, then surely the fact that discretionary writs were granted by the appellate court should have alerted Petitioners to raise the issue presented here - i.e. that under the circumstances, dismissal of their lawsuits would deprive them of due process. And if the granting of the writ did not alert the Petitioners to the due process argument, then the decision of that court which actually dismissed their petitions most certainly should have.

Assuming *arguendo,* that the decision of the appellate court was "unexpected," the Petitioners were then required to invoke the constitutional protection at their "first opportunity" thereafter. But Petitioners failed to do so, even in their timely filed Application for Rehearing before the court of appeal. Petitioners offer no justification, nor is there any, for their failure to raise the question in that rehearing application. Thus, even according a construction most favorable to them, Petitioners failed to assert the question at their "first opportunity" and have lost the right to assert it here.

The result here should be the same as in *Wilson v. Cook,* 327 U.S. 474, 485 (1946) wherein this Court declined to review a challenge to a tax arising under the Fourteenth Amendment that was not

raised, even on rehearing, with the comment:

> Even if the opinion of the Supreme Court of Arkansas had proceeded on a ground so unexpected as to make timely by petition for rehearing, the raising of the federal question now for the first time advanced . . . Petitioners in their petition for rehearing did not suggest them.

Only in Application for discretionary Writs of Certiorari to the Louisiana Supreme Court was the issue feebly advanced. The Louisiana Supreme Court denied writs. In Louisiana, review by the Louisiana Supreme Court is discretionary;[7] moreover, Louisiana law is well settled

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[7]The fact that review in the Louisiana Supreme Court is discretionary suggests another deficiency in the Petition. The Louisiana Supreme Court's denial of writs does not constitute a decision on the merits of the case. The petition for writ of certiorari should have been directed to the Fourth Circuit Court of Appeal, not the Supreme Court. *See: Faretta v. California*, 422 U.S. 806, 812 (1975); *Callender v. Florida*, 380 U.S. 519 (1965), 383 U.S. 270 (1966).

that the Supreme Court will not consider questions not timely raised and preserved for review below. *See e.g. Shally v. New Orleans Public Service,* 159 La. 519, 105 So.606 (1925); *Lemire v. New Orleans Public Service,* 458 So.2d 1308, 1311 (La. 1984). This is, of itself, an "independent and adequate state ground" for the Louisiana Supreme Court's refusal to consider the due process question. *Michigan v. Tyler, supra.*

The Petitioners had the opportunity to raise and litigate below, in both the trial and appellate courts, the question of whether the alleged construction of the state procedures urged by Respondent would result in a deprivation of their due process right to be heard. They did not timely assert it. The due process argument comes too late to preserve this Court's jurisdiction to consider it.

2. THIS COURT LACKS JURISDICTION TO CONSIDER THIS CLAIM, BECAUSE THE CASE BELOW WAS DECIDED ON AN INDEPENDENT AND ADEQUATE STATE GROUND

The Claim

Even assuming that the federal due process question is properly before this Court, it has no merit. The substance of Petitioners' complaint seems to be that the court of appeal below relied on *Lowrey v. Chevrolet, Inc. v. Brumley,* 510 So.2d 1294 (La.App. 3rd Cir. 1976) *writ denied* 514 So.2d 20 (La. 1987), a case decided after their suits had already been filed pursuant to La. R.S. 47:2110. Petitioners suggest that until *Lowrey* was decided, they did not know that they were required to comply exclusively with the procedures established in La. R.S. 47:1998, which requires exhaustion of administrative remedies when a taxpayer challenges the "correctness" of his assessment.

Relying on *Chevron v. Huson*[8] and its progeny, Petitioners now claim that *Lowrey* was "retroactively" applied to them to their detriment. They claim that the rule announced in *Lowrey* was "not reasonably foreseeable under the then existing statutory scheme or jurisprudence," and that a "hypertechnical procedural error" was invoked to deny them a hearing on the merits of the case. None of these allegations are supported or supportable when viewed in the light of Louisiana law as it existed when the Petitioners filed their suits.

Again, it is necessary to start with the general principle that this Court does

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[8]404 U.S. 97 (1971). Strictly speaking, *Chevron* and the other cases cited by Petitioners are not due process cases, although some of the factors enunciated in *Chevron* are similar to those which guide the Court in considering whether a state court decision has denied a litigant due process.

not have jurisdiction to review a state court decision decided on an "independent and adequate" state procedural ground. Despite their clamor to the contrary, Petitioners cannot demonstrate that their remedy below was "speculative" or "uncertain" so as to invoke this Court's jurisdiction. Similarly, they cannot show that the court of appeals' decision was "unexpected" or that they could not have "reasonably anticipated" the result below.[9]

The Decision Below Was Not Unexpected

Petitioners asserted below, and here, that theirs was not a "correctness" challenge, but rather a challenge to the "legality" of the tax, and that they were entitled to proceed under the "alternative" procedure in La. R.S. 47:2110. As to the

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[9]*See e.g. Pruneyard Shopping Center, supra.*

"correctness" *versus* "legality" distinction the Louisiana Fourth Circuit correctly held:

> We find, however that plaintiffs incorrectly construe this and other "constitutional" principles to argue that their challenge is not for "correctness." "Correctness" includes both the standard of true value and the uniformity and equality required by law. The achievement of both is the goal, the absence of either creates incorrectness. That uniformity and equality are given higher priority than true value does not make an attack on the former rather than the latter something other than a challenge for "correctness."

Petitioners' Appendix, p. A-45, 46.[10] The court of appeal then held:

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[10]It is not the province of this Court to review the validity *vel non,* of that substantive interpretation of Louisiana law. Even if it was incorrect, "it is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law." *American Railway Express Co. v. Commonwealth of Kentucky,* 273 U.S. 269, 273 (1927).

> Because the Louisiana Constitution of 1974 mandates the procedures for "correctness" challenges, La. R.S. 47:2110, to the extent its direct action provisions conflict with the Constitution must apply only to non-correctness challenges. *Lowrey* *** *Capital Drilling Company v. Graves,* 496 So.2d 487 (La. App. 1st Cir. 1986)

Westminster, supra; Petitioners' Appendix, page A-45.

It is only through the use of certain affirmative misstatements of the law that Petitioners are able to muster any support for their untimely claim that the decision below deprived them of due process. Petitioners assert that:

> "[u]ntil a point in time (the decision in *Lowrey*) which occurred after this suit was filed, there appeared to be available . . . two roads to the judicial determination of both the correctness and legality of their ad valorem taxes . . .,"

either La. R.S. 47:1998 or La. R.S.

47:2110. At page 21, Petitioners make the astonishing assertion that:

> It was not until *Lowrey* that any court had held that the exclusive remedy for "correctness" was an appeal from the Louisiana Tax Commission decision . . .

Contrary to these sweeping and erroneous characterizations, Louisiana law has long recognized a distinction between the procedures that must be followed by a taxpayer in challenges involving the "correctness" and legality of a tax, as opposed to challenges solely involving the "legality" of a tax. Long before *Lowrey*, Louisiana courts had held that a suit for refund of taxes paid under protest alleging as its basis lack of uniformity of assessments did not challenge the "legality" of the tax or the "method of its enforcement," as envisioned by La. R.S. 47:2110, but rather the "correctness" of

the underlying assessments pursuant to La. R.S. 47: 1998. In cases involving the "correctness" of assessments, Louisiana courts have indeed previously held that taxpayers must first exhaust administrative remedies.[11]

The issue was discussed and resolved by the Louisiana Supreme Court over twenty years ago in *Dixon v. Flournoy,* 176 So.2d 138 (La. 1965). There, petitioners filed suit under La. R.S. 47:2110 for refund of taxes paid under protest, alleging discrimination based upon assessment of their properties at an average ratio higher than the state-wide average. The plaintiffs invoked La. R.S.

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[11]This Court has recognized and it is beyond peradventure that the state has a legitimate procedural interest in imposing the requirement of exhaustion of administrative remedies in tax cases. *See: Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239 (1931); *Gorham Manufacturing, supra* and cases cited therein.

47:2110 as the basis of their suit, and the Court dismissed their complaint for failure to comply with the exclusive requirements of 47:1998, which at that time was available to any taxpayer wishing to test the "correctness or legality of any assessment made against property" belonging to him.

In response to the argument that the plaintiffs did not attack the correctness or legality of the assessments of the tax against them pursuant to Section 1998, but rather launched an attack against the tax itself by alleging non-uniform assessments pursuant to Section 2110, the Court observed the following:

> While the ultimate object of the plaintiffs' suit is to have the property tax as applied to them declared unconstitutional, this object is dependent upon their being able to prove that the assessment upon which the tax is based is incorrect and illegal. Their real complaint,

> **therefore, is not the tax as distinguished from the assessment, but is that their assessments are incorrect and illegal; and a suit which has as one of its objects to contest the correctness or legality of an assessment must satisfy the conditions of the second paragraph of R.S. 47:1998.**

176 So.2d at 142 (emphasis added).

The decision below is not "diametrically different from prior Louisiana Supreme Court" decisions, as Petitioners assert at page 20, for the court below clearly applied the same rule of law enunciated twenty years before in *Dixon v. Flournoy*. Nor is it true that "it was not until *Lowrey* that any court had held that the exclusive remedy for 'correctness' was an appeal from the Louisiana Tax Commission." Petition, p. 21. *Dixon* had clearly done so.[12]

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[12]Interestingly the United States Fifth Circuit Court of Appeal reviewed the procedures established

The Effect of Article VII § 18(E) of the Louisiana Constitution of 1974

It is against this historical perspective that Petitioners reliance on *Churchill Farms, Inc. v. Louisiana Tax Commission,* 338 So.2d 963 (La. App. 4th Cir. 1976) and *Giraud v. City of New Orleans,* 359 So.2d 294 (La. App. 4th Cir. 1975), must be judged. These are the cases cited by Petitioners in support of their conclusion that those decisions announce the only "consistent" interpretations of the statutory provisions. Petition, p. 23.

In *Churchill Farms,* the plaintiffs sought refund of 1969 ad valorem taxes

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in *Dixon* against a challenge that the Louisiana scheme for judicial review of assessments was inadequate for a variety of reasons and found that those remedies were "plain, speedy and efficient within the contemplation of 28 USCA § 1341." *Bussie v. Long,* 254 F.Supp. 797 (E.D.La.) *aff'd* 383 F2d 766, 770 (1967).

paid under protest. The court noted that *Dixon v. Flournoy* limited La. R.S. 47:2110 to suits "questioning the constitutionality of the tax itself and not an unconstitutional administration of the assessment law,"[13] but found that *Dixon* was not controlling because a 1970 amendment to 47:2110(D) had legislatively overruled the Louisiana Supreme Court pronouncement in *Dixon*. *See* 338 So.2d at 966. The amendment to Section 2110(D) provided as follows:

> The right of action provided in this section shall be in addition to any rights elsewhere provided in this subtitle, including R.S. 47:1998, affording taxpayers an opportunity to test the legality or correctness of their assessment or ad valorem taxes paid under protest before the courts of this state.

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[13] 338 So.2d at 965.

The court of appeal held that the 1970 revision, which added the phrase "including R.S. 47:1998," elevated 47:2110 to the status of an alternative remedy, "a separate right, in no way dependent on 47:1998." It is this provision and these cases on which Petitioners now rely.

However, while those decisions may have been an accurate statement of the law when they were decided, their continued vitality was ended with the adoption of the Louisiana Constitution of 1974. At that time, Article VII, Section 18(E) of that Louisiana Constitution gave constitutional dimension to the requirement of obtaining administrative review for all "correctness" challenges to ad valorem taxes, once again elevating the requirements of Section 1998 over those of Section 2110 and mandating administrative

review of all "correctness" challenges. Article VII, § 18(E) provides:

> The correctness of assessments by the assessor shall be subject to review first by the parish governing authority, then by the Louisiana Tax Commission or its successor, and finally by the courts, all in accordance with procedures established by law.

This constitutional amendment had the effect of legislatively reinstating the rule of *Dixon v. Flournoy.*

This amendment did not take effect until 1978, however.[14] Thus, it could not have affected, and was properly not considered by the courts in, *Churchill Farms* or *Giraud.* By their own admission Petitioners "relied" on cases decided prior to the effective date of Article VII, Section 18(E). That reliance was not

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[14] *See* La. Const. 1974 Art. XIV § 13; *Giraud v. City of New Orleans,* 359 So.2d 295, 300 (La. App. 4th Cir. 1978).

reasonable and certainly provides no support for their due process claim.

After its effective date of January 1, 1978, Article VII, §18(E) of the Constitution of 1974 became the guiding light in the interpretation of both La. R.S. 47:1998 and 47:2110. It is axiomatic that a statute in conflict with a constitutional provision must fall. The court of appeal applied this fundamental principle when it held that with the advent of the 1974 Constitution, Section 2110 was available only to challenge "non-correctness" claims.

Between the time *Churchill Farms* and *Giraud* were decided and the time Petitioners filed suit, the law of Louisiana had changed. It is as simple as that. The decision of the court of appeal was not "unexpected" or "unsupported." *Dixon v. Flournoy* had years ago foretold the Petitioners that their claim was one of

"correctness," and the adoption of Article VII, Section 18(E) in the 1974 Constitution at least "foreshadowed," if not foretold, that La. R.S. 47:1998 was the exclusive constitutionally mandated means of challenging the "correctness" of their assessment.[15]

The Decision Was "Foreseen"

Moreover, contrary to the Petitioners' bald assertion that the result in *Lowrey*

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[15]The distinction between a challenge to the "correctness" and legality of an assessment on the one hand, and a challenge solely to the legality of an assessment, and a requirement of exhaustion for the former, is not unique to Louisiana law. Any complaint that such a distinction is "hypertechnical" is frivolous. *See: Parrent v. Fannin,* 616 S.W. 2d 501 (Ky. 1981); *Dennehy v. Department of Revenue,* 668 P2d 1210 (Or. 1983); *Felix v. Indiana Dept. of State Revenue,* 502 NE2d 119 (Ind. App. 1986). In fact, this Court dismissed for "lack of a substantial federal question" an appeal from a California court that decided issues virtually identical to the case at bar. *Westinghouse Electric Corp. v. Los Angeles County,* 42 Cal. App. 3d 32, 116 Cal. Rpt. 742 (1974) *appeal dismissed* 422 U.S. 1001 (1975). The dismissal of that appeal is to be given substantive effect and should control the outcome of this litigation.

was not foreseeable, it was actually foreseen by the Court in *Capital Drilling Co. v. Graves,*[16] decided before Petitioners filed suit:

> **Constitutionally, the *correctness of assessments by the assessor* must be appealed administratively first to the parish governing authority (board of review) and then to the Louisiana Tax Commission; thereafter, the assessment may be appealed judicially. La. Const. of 1974 art. VII §18(E); La. R.S. 47:1992; La. R.S. 47:1989; La. R.S. 47:1998. . . . Clearly, if La. R.S. 47:2110 conflicts with Article VII, §18(E), it is unconstitutional. Thus, La. R.S. 47:2110 must be construed as being applicable to only to *non-correctness* claims if it is to have validity.**

Capital Drilling, supra, at 492 n.2 (italics

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[16]496 So.2d 487 (La. App. 1st Cir. 1986).

by the court; additional emphasis added).[17]

Thus, this case does not:

> deal . . . with a situation where a state court has followed a regular past practice of entertaining claims in a given procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar. *Barr v. City of Columbia,* 378 U.S. 146, 84 S.Ct. 1734, 12 L.Ed.2d 766. This is not a case where a procedural requirement has been sprung upon an unwary litigant when prior practice did not give him fair notice of its existence. *Wright v. State of Georgia,* 373 U.S. 284, 291, 83 S.Ct. 1240, 1245, 10 L.Ed.2d 349.

Walker v. City of Birmingham, 388 U.S. 307, 319 (1967). Rather, *Dixon, Capital*

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[17]It is appalling that the Petition omits any reference to *Capital Drilling,* or the enactment of Article VII, § 18(E) of the 1974 Constitution. These authorities were clearly advanced in both the trial and appellate courts, and were specifically relied upon by the court of appeal. Petitioners failure to acknowledge the existence or effect of either of these salient legal facts, suggests that Petitioners understand that their disclosure operates to defeat their claim.

Drilling, and Article VII § 18(E) of the Constitution each provided "fair notice"[18] that La. R.S. 47:2110 was not available to Petitioners as an "alternative" to La. R.S. 47:1998.

Finally, it is apparent that the decision below did not "overrule any clear past precedent," as Petitioners claim, because the Louisiana Supreme Court did not have occasion to construe the statutes at issue after the effective date of Article VII, § 18(E). This does not mean that

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[18]Some Petitioners sought administrative review from the Tax Commission but did not thereafter timely seek judicial review. Their failure to do so is unexcusable in light of La. R.S. 47:1989, which provides in part: "All decisions by the tax commission are final unless appealed to the district court within thirty days." Moreover, each of these Petitioners received a letter from the Tax Commission, dutifully reproduced in Petitioners' Appendix (A-32), which advised "you have the right to appeal this decision to the district court within thirty (30) days of the date of this letter." If these explicit directives do not constitute "fair warning," it is difficult to imagine what does.

their remedy was so uncertain as to support the claim that they were denied due process; to the contrary, it should have alerted them to proceed with caution:

> Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own.

Brinkerhoff-Faris, supra, at 682, n.9. Petitioners here assumed that risk, and must bear the consequences.

From 1970, when the Section 1998 "savings clause" was inserted in Section 2110(D), until January, 1978, when Article VII, Section 18(E) of the 1974 Constitution became effective, there was a procedural window during which a taxpayer could arguably attack the constitutionality of alleged non-uniformity of his assessment under either Section

2110 or Section 1998. With the January 1978 effective date of Article VII, Section 18(E) of the 1974 Constitution, that window was closed and locked. This was clearly and reasonably foreseen by the court in *Capital Drilling,* and applied in *Lowrey* and in the court of appeal below. The result was correct. The decision below is sure footed in a rock bed of jurisprudence and logic; it presents no federal claim. This court therefore has no jurisdiction and the Petition is due to be denied.

CONCLUSION

It is plain that Louisiana did not deprive these taxpayers of any constitutional right, including that of due process. Rather, these Petitioners had a remedy, but simply failed to avail themselves of it.

This Court does not have jurisdiction to now consider this claim, not only because it is totally devoid of merit, but also because Petitioners unexcusably failed to timely raise it below.

Respondent respectfully submits that the Petition is due to be summarily denied.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on all counsel of record in this proceeding by depositing a copy of same, duly addressed to each of them, in the United States Mail, First class, postage prepaid, this 3rd day of February, 1989.

GALEN S. BROWN

Supreme Court, U.S.
FILED
FEB 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1102

In the Supreme Court of the United States

OCTOBER TERM, 1988

WESTMINSTER MANAGEMENT CORPORATION, ET ALS.

Petitioners,

v.

PAUL C. MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS, AND ATTORNEY GENERAL WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

RESPONDENTS APPENDIX TO OPPOSITION

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THE SUPREME COURT
OF THE STATE OF LOUISIANA

WESTMINSTER MANAGEMENT CORPORATION, ET AL

VS. NO. 87-CC-2602

PAUL C. MITCHELL, DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS

- - - - - - - - - - -

IN RE: Mitchell, Paul C.; Applying for Writ of Certiorari and/or Review, Prohibition, Mandamus, Supervisory and/or Remedial Writs; to the Court of Appeal, Fourth Circuit, Number CW-8656; Parish of Orleans Civil District Court Div. "G" Number 87-3697, 87-3727, 87-3728, 87-3898

- - - - - - - - - - -

December 10, 1987

Granted. The judgment of the Court of Appeal is reversed and vacated, and the judgment of the district court is reinstated, for the reasons assigned by the district judge.

JAD

PFC

JLD

JCW

HTL

LFC

Supreme Court of Louisiana
December 10, 1987

s/ _____
Clerk of Court
For the Court

B-1

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 87-3697 c/w
87-3727
87-3728
87-3898

DIVISION "G"

DOCKET 4

WESTMINSTER MANAGEMENT CORPORATION, ET AL

VERSUS

PAUL C. MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS

JUDGMENT

This cause came on for hearing on June 12, 1987, on rule to release funds held in escrow filed herein on May 12, 1987 and was continued for submission of briefs by counsel.

PRESENT: Betty Mullin, Moise Steeg, Robert Steeg, Mitchell Herzog, Richard Anderson - Attorneys for plaintiffs

Blaine Lecesne - Attorney for defendant

WHEN, after hearing the pleadings and arguments the court having considered the entire record and the memorandum filed therein and for the written reasons herein assigned and made part of the record;

IT IS ORDERED AND ADJUDGED AND DECREED that the rule to release funds held in escrow be and the same is hereby granted, and that the sum of $5,730,654.12 is released from escrow to the City of New Orleans for utilization according to law.

JUDGMENT signed this 3rd day of August, 1987.

s/ STEVEN R. PLOTKIN

Judge

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 87-3697 c/w
87-3727
87-3728
87-3898

DIVISION "G"

DOCKET 4

WESTMINSTER MANAGEMENT CORPORATION, ET AL

VERSUS

PAUL C. MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS

REASONS FOR JUDGMENT

This matter came before the Court on a motion filed by defendant, Paul C. Mitchell, Jr., Director of Finance of the City of New Orleans (City) against the plaintiffs, Westminster Management Corp., et al, Pan American Life Insurance Co., Panacon, and BEVPAC Properties (taxpayers) for a partial release of escrowed taxes paid by the taxpayers

under protest in accordance with La. R.S. 47:2110.

The plaintiffs' suit challenges the validity and constitutionality of 1987 ad valorem tax assessed on realty throughout the City of New Orleans. Plaintiffs allege that the 1987 ad valorem tax assessments were not uniform city-wide and pray for a full refund of the taxes paid under protest.

The narrow issue presented is whether all or part of the property taxes paid by plaintiffs in 1987 should be escrowed pending the outcome of the litigation. The resolution of this issue requires an examination of the legislative history of La. R.S. 47:2110.

The legislative history of Section 2110 begins with Act 16 of 1934, which prohibited state courts from issuing any process to restrain the collection of any

tax imposed by the State of Louisiana or any political division thereof. The statute also provided that the taxpayer who paid any tax, which was declared illegal, would be reimbursed.

Act 23 of 1935 retained the provisions of Act 16, but defined the procedure for instituting suit to recover taxes declared illegal.

Act 330 of 1938 repealed and replaced Act 16 and Act 23, and created the doctrine of "payment under protest." Section 2(A) of this statute provided:

> "A right of action is hereby created to afford a remedy at law for any person aggrieved by the provisions of this Act; and in case of any such person resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto, such person shall pay the amount found due by the officer designated by law for the collection of the said tax and shall give the officer notice, at the time, of his intention to file

> suit for the recovery of the same; and upon receipt of such notice, the amount so paid shall be segregated and held by the officer designated by law for the collection of the tax for a period of thirty (30) days; and if suit be filed within such time for the recovery of such amount, such funds so segregated shall be further held, pending the outcome of such suit. If the person prevails, the officer designated by law for the collection of the tax shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the officer designated by law for the collection of said tax to the date of refund." (Emphasis added)

In 1986, the Legislature enacted Act 540, which amended Section A of La. R.S. 47:2110 to read as follows:

> "A. No court of this state shall issue any process whatsoever to restrain the collection of an ad valorem tax imposed by the state, or by any political subdivision thereof, under authority granted to it by the legislature or by the constitution. Any person resisting the payment of any

amount of tax found due, or the enforcement of any provision of the tax laws in relation thereto, shall pay the amount found due to the officer designated by law for the collection of such tax and shall give the officer notice at the time of payment of his intention to file suit for the recovery of such tax. Upon receipt of such notice, the amount so paid shall be segregated and held by the officer for a period of thirty days. If suit is filed within such time for the recovery of the tax, then that portion of the taxes paid that are in dispute shall be deemed as paid under protest and such amount shall be segregated and shall be further held pending the outcome of the suit. That portion of the taxes paid by the taxpayer to the officer which is not in dispute shall not be made subject to the protest. If the taxpayer prevails, the officer shall refund the amount to the taxpayer with interest at the rate of two percent per annum for the period from the date such funds were received by the officer to the date of such refund. If the taxpayer does not prevail, the taxpayer shall be liable for the additional taxes together with interest at the rate of two percent per annum from the date the notice of intention to file suit for

> recovery of taxes was given to the officer until the date such taxes are paid. (Emphasis added)

The primary rule of statutory construction is that of legislative intent, meaning the courts must endeavor to ascertain the reason and spirit of the law, or the cause which induced the legislature to enact the law. La. C.C. Art. 18. In determining legislative intent, the words of an act are to be understood in their usual signification and in accordance with the general and popular use of the words. La. C.C. Art. 14.

It is clear and unambiguous that by enacting Act 540 of 1986, the Legislature intended to limit the amount of taxes paid under protest to the portion of taxes "in dispute." The amendment creates a distinction between the portion of the taxes paid that are "in dispute" and the

portion of taxes paid that are not in dispute. It declares unequivocally that the portion of the taxes paid which is not in dispute shall not be made subject to the protest and that only the disputed portion of the taxes paid under protest shall be escrowed pending the outcome of the litigation. (Emphasis added)

In 1987, plaintiffs paid approximately $9,727,336.99 in ad valorem property taxes under protest. These funds are presently being held in an escrow account and have been invested in United States Treasury bills. Plaintiffs claim their entire tax payment is in dispute because the 1987 assessments are not uniform and the Court could order a reassessment or equalization of all assessments in the City of New Orleans. Secondly, plaintiffs contend that the amount of any tax refund, with

litigation costs and interest, is incalculable at this time.

The City contends that the amount in dispute is the difference between plaintiffs' 1987 taxes ($9,727,336.99) and 1986 taxes ($5,730,654.12), and that this quantum must be held in escrow.

There is no legal authority to support the taxpayers' position that their tax liability in 1987 could be less than their tax liability in 1986. However, in Probst v. City of New Orleans, 325 So.2d 665 (La. App. 4th Cir. 1976), rev'd on other grounds, 337 So.2d 1081 (La. 1976), the Fourth Circuit Court of Appeals limited a taxpayer's relief in a suit challenging the constitutionality of property assessments to reinstatement of the prior year's assessment. Therefore, it is more likely than not that if the taxpayers prevail, their ad valorem tax liability for 1987 will

not be less than $5,730,654.12, the amount of their 1986 ad valorem taxes.

The City of New Orleans is not insolvent. Should the taxpayers secure a judgment higher than their cumulative 1986 taxes, the City has the present and future ability to satisfy the liability. The calculation of litigation costs and interest at this time is irrelevant, because that is not required by the statute under review. Furthermore, the interest income on the escrowed funds will generate surplus funds to outbalance these expenses.

In conclusion, the clear legislative language of La. R.S. 47:2110(A), mandates that the Court hold that the ad valorem property taxes paid by the owners under protest, which are in dispute, is the sum of $3,996,682.87, the difference between plaintiffs' 1987 taxes ($9,727,336.99) and 1986 taxes ($5,730,654.12). The sum of

$5,730,654.12 is not in dispute and shall be immediately released from escrow and may be utilized by the City, as provided by law.

New Orleans, Louisiana this 3rd day of August, 1987.

s/ STEVEN R. PLOTKIN

Judge